No. 94-1654-CFX
Status: GRANTED

Title: Board of County Commissioners, Wabaunsee County, Kansas, Petitioner
v.
Keen Umbehr

Docketed:
April 3, 1995

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Patterson,Donald

Counsel for respondent: Seaton,Richard H., Van Kirk,Robert A.

40 copies ptn rcd 4-3-95, 40 copies suppl appdx. rcd 4-10-95.

Entry	Date	Note	Proceedings and Orders
1	Apr 3 1995	G	Petition for writ of certiorari filed.
2	Apr 3 1995		40 copies suppl. appdx. to petition for a writ of certiorari filed.
3	May 4 1995		Brief of respondent Keen Umbehr in opposition filed.
4	May 10 1995		DISTRIBUTED. May 26, 1995 (Page 2)
5	Jun 7 1995		REDISTRIBUTED. June 23, 1995 (Page 1)
7	Jun 26 1995		REDISTRIBUTED. June 29, 1995 (Page 1)
8	Jun 29 1995		Petition GRANTED.
			**********
9	Aug 4 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Tenth Circuit.
10	Aug 9 1995		Joint appendix filed.
11	Aug 9 1995		Brief of petitioners Glen Heiser and George Spencer filed.
13	Aug 22 1995		Order extending time to file brief of respondent on the merits until October 6, 1995.
14	Aug 23 1995		Record filed.
		*	Certified record proceedings United States District Court for the District of Kansas (BOX).
17	Aug 24 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Oct 3 1995		SET FOR ARGUMENT TUESDAY, NOVEMBER 28, 1995. (2ND CASE).
21	Oct 5 1995	X	Brief amici curiae of American Civil Liberties Union, et al. filed.
16	Oct 6 1995		CIRCULATED.
18	Oct 6 1995	X	Brief of respondent Keen A. Umbehr filed.
19	Oct 6 1995	X	Brief amicus curiae of United States filed.
20	Oct 6 1995	X	Brief amicus curiae of Planned Parenthood Federation of America, Inc. filed.
22	Nov 6 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Nov 6 1995	X	Reply brief of petitioners filed.
25	Nov 20 1995		Letter from counsel for the respondent received and distributed.
24	Nov 28 1995		ARGUED.

In The
Supreme Court of the United States
October Term 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny be extended and amplified to protect the economic rights of government contractors whose services are terminable at will?

2. How are the tests of *Pickering* and its progeny to be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended?

3. If independent contractors are to be given the same protections as employees under *Pickering*, will the affirmative defenses available to employers remain available to the contracting agency?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

GLEN HEISER and GEORGE SPENCER, in their official capacities as members of the Board of County Commissioners of Wabaunsee County, Kansas.

Respondents:

KEEN A. UMBEHR.

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OPINIONS BELOW

The decision of the U.S. District Court for the District of Kansas granting summary judgment to petitioners is reported as *Umbehr v. McClure, et al.*, 840 F.Supp. 837 (D.Kan. 1993). The decision of the Tenth Circuit Court of Appeals, reversing the grant of summary judgment to petitioners in part and remanding the case for further proceedings against petitioners in their official capacities is published as *Umbehr v. McClure, et al.*, 44 F.3d 876 (10th Cir. 1995). Parallel proceedings in state court between the same parties have resulted in two published decisions: see *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

STATEMENT OF JURISDICTION

Original jurisdiction in the U.S. District Court for the District of Kansas was based upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. Respondent prosecuted a timely appeal to the Tenth Circuit Court of Appeals under the authority of 28 U.S.C. § 1291. This Court has jurisdiction to review the decision of the Tenth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

The judgment of the Tenth Circuit Court of Appeals was entered on January 4, 1995. A petition for rehearing was denied on February 10, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 1:

FREEDOM OF RELIGION, SPEECH AND PRESS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case squarely confronts the Court with the need to determine the scope of the rights and duties of persons who provide public services through contract or franchise arrangements with local government, rather than serving directly as governmental employees. This Court has not previously decided whether the free speech protections afforded to governmental employees will be extended to persons who provide services to the public less directly, as non-employee contractors or franchisees.

The Tenth Circuit Court of Appeals has decided that the rights of employees should be extended to those who provide public services as non-employees, no matter how tenuous the contractual relationship with the government may be and without regard to the unqualified contractual right of the government to terminate the relationship at will. The Tenth Circuit Court of Appeals has

imposed on local units of government the obligation to avoid economic injury to government contractors whose statements on issues of public concern may have irritated public administrators. Because the decision of the Tenth Circuit Court of Appeals is clearly in conflict with a number of decisions on the same issue rendered by other Circuit Courts of Appeal, and because this Court has never addressed this matter of increasing public importance, review is necessary.

In this lawsuit a failed candidate for public office seeks the assistance of the Federal Courts in taking control of those aspects of local government from which he has derived a personal profit. Mr. Umbehr claims that the First Amendment guarantees him the continuing right to operate a municipal trash hauling service as a government sanctioned monopoly, just because he publicly challenged the integrity of the Board during his

election campaign. He does not claim and did not have any legal right to a continuation of his monopoly, absent some event which would permit invocation of the First Amendment. By wrapping himself in the protection of the First Amendment, Umbehr seeks to have the Court grant him greater economic rights than he could have seized as spoils had he won the election.

PROCEDURAL BACKGROUND

The parties have been in litigation with one another since 1990 in disputes arising from the contract for the collection of private refuse in six small towns in a sparsely populated county in east central Kansas. Plaintiff Keen Umbehr operated the municipal trash collection service for residents of the six towns under a contract negotiated through the Board of County Commissioners. Although no county refuse was collected under the contract, the county was a party to the agreement because its landfill

was the expected ultimate resting place for the trash.

Under the contract those towns which elected to participate would pay fees to Umbehr, and Umbehr would pay landfill charges for using the county dump. Each town agreed not to do business with any competing trash hauler. The contract was renewable annually, with an option for any party to terminate with 60 days' prior notice. The contract gave Umbehr the right but not the duty to dispose of the collected refuse at the landfill owned by the county, in return for his agreement to pay landfill charges under a schedule fixed by the county. The contract provided for termination for cause and included as cause the nonpayment of fees for depositing refuse at the county landfill.

In early 1989 the Wabaunsee County Commission began discussing the need to raise landfill rates. Umbehr appeared at County Commission meetings and spoke against a

general increase of user fees, which would have increased his own operating costs. Umbehr stated that he preferred increased fees to be paid out of other existing funds or through tax increases instead. Umbehr was sufficiently concerned about this and other issues that he declared himself a candidate for an upcoming vacancy on the three-member Board of County Commissioners. (Umbehr contested the bid of Commissioner McClure for re-election.)

During the course of his campaign Umbehr made public comments, both in and out of print, criticizing the individual members of the Board of County Commissioners. As a result of some of his criticisms the official conduct of the members of the Board was investigated by the Kansas Attorney General. On December 29, 1989 the Attorney General reported the result of his investigation, which included an express finding that no

member of the Board of County Commissioners had engaged in any misconduct.

In February, 1990 the Board voted 2-1 to terminate Mr. Umbehr's trash collection contract. Commissioner McClure voted against termination. Because notice of termination was not given properly , Umbehr's contract renewed automatically for another year.

In April, 1990 the Board voted to raise the rates for all landfill users, including Umbehr, effective June 1. Umbehr refused to pay the increased rates and filed a civil action in the District Court of Wabaunsee County, Kansas on June 1, 1990 seeking an injunction against the rate hike. This lawsuit was unsuccessful, and ultimately resulted in published decisions on appeal in the Kansas courts. See *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992). The Kansas

Supreme Court held that Umbehr had no right to appeal from the decision to raise the landfill rates absent proof of a violation of his constitutional rights or other similar oppressive conduct.

Both Umbehr and McClure failed in their 1990 election bids, losing to a third candidate, Steven Anderson. Umbehr's public criticisms of the Board members ceased after the election.

The question of terminating the municipal trash hauling contract was again debated in January, 1991. Commissioners Spencer and Heiser voted to terminate, and Commissioner Anderson voted nay. At the time the vote was taken Umbehr had been in default in the payment of landfill charges for over six months. His default was not stated to be a motivating factor in the votes of the Board members, however. Umbehr promptly negotiated exclusive contracts with five of the six

participating towns, with higher rates payable to him.

Throughout the state court appeal Umbehr had refused to pay the increased fees mandated in the spring of 1990. On July 25, 1991, an order of the District Court of Wabaunsee County prohibited Umbehr from continuing to use the landfill until the delinquent payments were made. In August, 1991 Umbehr paid the overdue user fees for the period from June, 1990 to May, 1991.

The present action was filed in the U.S. District Court for the District of Kansas on May 15, 1991, alleging that the decision to terminate Umbehr's monopoly trash hauling contract on January 28, 1991 was a violation of his First Amendment rights. Umbehr sued the three County Commissioners who held office in 1990 when the original decision was made to terminate his contract, even though only two of them had voted for termination.

A summary judgment motion was filed on behalf of all defendants on December 16, 1991. Summary judgment was granted on December 30, 1993. The District Court held that all claims against the defendants in their official capacities were barred because independent contractors are not entitled to the same protection as employees under the First Amendment. The claims against all defendants in their individual capacities were also found to be barred by the application of qualified immunity. The claims against defendant McClure were found to be additionally barred because he had never voted to terminate the contract.

On review the Tenth Circuit Court of Appeals affirmed the decision with respect to all three defendants in their individual capacities, but reversed with respect to the official capacity claims. The Tenth Circuit disagreed with the reasoning of other circuits which had already ruled on the same

issue, concluding that independent contractors are entitled to relief for the retaliatory termination of at-will contractual relationships, so long as any potential economic benefit to the contractor is lost. In so holding the Tenth Circuit opinion expressly noted that its conclusion was "squarely in conflict with several other circuits, a posture we do not adopt lightly." The opinion further noted the view of the panel that the issue is one in which Supreme Court guidance is particularly needed. See 44 F.3d at p. 883.

ARGUMENT

THE MARKED DIFFERENCES OF OPINION AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING A KEY CONSTITUTIONAL ISSUE NEVER PREVIOUSLY DECIDED BY THIS COURT REQUIRE REVIEW.

A substantial body of case law has developed to establish the rights of public employees to express themselves freely on matters of public concern. This Court has recognized the practical necessity of some limitation on the work-related speech of government employees, in order to assure the orderly operation of governmental functions. The relative rights and responsibilities of the government employer and government employee have been articulated in a series of cases spanning more than twenty-five years: See *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111

L.Ed.2d 52 (1990); *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, ___ L.Ed.2d ___ (1995).

This Court's numerous prior decisions concerning the rights of public employees have avoided more general conclusions about the rights of persons whose economic relationship to the government falls short of employee status. Although the Court has noted outside the context of First Amendment rights that an independent contractor may have substantially the same rights as an employee against intentional punishment for the exercise of constitutional rights, the most recent statement on this subject carefully declined to state a rule generally applicable both to employees and to all independent contractors. Compare *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) with *Branti v. Finkel*, 445

U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). More recently this Court has more than once refused to review decisions of the Circuit Courts expressly rejecting any extension of First Amendment protection to the economic interests of independent contractors. See *LaFalce v. Houston, infra; Downtown Auto Parks, Inc. v. City of Milwaukee, infra; Sweeney v. Bond, infra; Lundblad v. Celeste, infra.*

The decision of the Tenth Circuit in this case is inconsistent with the conclusion reached by each of the other circuits which has expressly considered the degree to which independent contractors are entitled to a continuation of their economic relationship under a First Amendment analysis. There does not appear to be a majority view among the Circuits, but only fragmented and mutually inconsistent analysis and conclusions.

The Third and Seventh Circuits have expressly held that independent contractors

have no standing to object to termination of their services, even if a retaliatory motive is present. See *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 704 (7th Cir. 1991); *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986).

Two decisions of the Eighth Circuit Court of Appeals reach inconsistent conclusions concerning the rights of independent contractors under the First Amendment: See *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) concluding that only employees are protected and *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), where a non-employee physician's hospital privileges were construed to be protected.

One Circuit Court of Appeals has avoided a direct determination of the status of independent contractors under current law, ruling only that qualified immunity applies

to the termination of an independent contractor in early 1983 because such rights were not then clearly established. See *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), opinion on rehearing 924 F.2d 627 (1991).

The Fifth Circuit Court of Appeals has decided that independent contractors should have <u>greater</u>, not less, protection than direct employees. In the cases of *Copsey v. Swearingen*, 36 F.3d 1336 (5th Cir. 1994) and *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) that Court held that the termination of public licenses in retaliation against protected speech is actionable. *Copsey* and *Blackburn* refused to apply the balancing test of *Pickering* to economic relationships other than employer and employee, preferring instead to make all retaliatory terminations of license holders or contractors actionable without regard to the application of the *Pickering* balancing

test. The Fifth Circuit disagreed with the conclusions of the Sixth Circuit that qualified immunity should apply due to the absence of clearly established law. Compare *Blackburn, supra*, to *Lundblad v. Celeste, supra*.

The Ninth Circuit Court of Appeals has applied the *Pickering* test to situations where a "workplace grievance" is involved, even if the plaintiff is a licensee or contractor rather than a public employee. See *Havekost v. United States Department of Navy*, 925 F.2d 316 (9th Cir. 1991).

The Tenth Circuit, in the present case and in its earlier decision in *Abercrombie v. City of Catoosa, Oklahoma*, 896 F.2d 1228 (10th Cir. 1990), has determined that the grievances of independent contractors should be analyzed under *Pickering*, no matter what economic benefit may be at stake. The Tenth Circuit in the present case has sided with

the Sixth and against the Fifth on the issue of qualified immunity.

Application of the standard followed in the Third and Seventh Circuits would clearly result in a victory for the governmental defendant whenever a relationship falls short of an employment contract. The rule followed by the Sixth Circuit would result in victory only where qualified immunity would apply. The Ninth Circuit would restrict the *Pickering* analysis to workplace environments, no matter what the relationship between the parties. The Fifth Circuit would extend First Amendment protection to contracts and licenses wholly outside the workplace, but would deprive the government of the benefit of the *Pickering* balancing test where a workplace grievance is not involved. The Tenth Circuit would extend protection to all economic interests that may be adversely affected by an act of retaliation, even where

no direct economic benefit has ever flowed from the government agency to the contractor.

There is no obvious means by which to apply any of this Court's precedents to the present facts. It is unclear how the role of Mr. Umbehr, who in effect was the head of a government agency whose functions had been privatized, fits into the distinction between ordinary workers and policymakers under *Branti*, for example. There is no "workplace" where the contractor's actions can be disruptive, as contemplated by *Pickering*. Clearly a common sense analysis would support the conclusion that Umbehr's termination was a legitimate nonretaliatory administrative act. Yet it is not clear how common sense is to be applied to these facts under the test of *Waters v. Churchill*, for example. If the rule followed in the Fifth Circuit were applied to these facts, the result would be a clear victory for special interests and spoil seekers, contrary to the intent of

Rutan, which would deny the right to control government service positions even to the victors at the polls, let alone the losers.

This wide spectrum of application and interpretation of the rule of *Pickering* creates an intolerable situation for government administrators, who are daily confronted with the need to make decisions concerning the granting, termination, or renewal of licenses, franchise rights, and public contracts. Their ability to act in the best interest of the public is severely hampered by the risk of litigation by those who publicly and forcefully demand a share of the public treasury. Unless and until the law is clarified every prudent public administrator will be tempted to grant special economic privileges to critics of local policy, solely to avoid the risk of retaliatory civil suits. This Court must announce a rule of law which protects the ability of local government to serve the

ability of local government to serve the needs of the people rather than being held hostage by vocal special interests. At a minimum this Court should reaffirm the right of government administrators to follow a rule of evenhanded treatment for all and objective fairness of result, rather than being subjected to special scrutiny of their personal motives every time the pocketbook of a personal critic is affected.

Respectfully submitted,

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APPENDIX

Keen A. UMBEHR, Plaintiff-Appellant,

v.

Joe McCLURE, Glen Heiser, and George Spencer, Defendants-Appellees.

No. 94-3022.

United States Court of Appeals,
Tenth Circuit.

Jan. 4, 1995.

Rehearing Denied Feb. 10, 1995.

Before ANDERSON and TACHA, Circuit Judges, and CAMPOS,* District Judge.

STEPHEN H. ANDERSON, Circuit Judge.

Plaintiff and appellant Keen A. Umbehr appeals the district court's grant of summary judgment to Defendants, members or ex-members of the Wabaunsee County Commission, on his 42 U.S.C. § 1983 action alleging that Defendants

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*The Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

terminated a trash hauling contract in retaliation for Mr. Umbehr's exercise of his right to free speech. For the following reasons, we REVERSE and REMAND.

BACKGROUND

Mr. Umbehr operated a trash hauling business in Wabaunsee County, Kansas. By statute, the county was obligated to provide a plan for solid waste disposal. In 1981, the county entered into a contract with Mr. Umbehr. The contract was renegotiated in 1985. The 1985 contract is the one at issue in this case. Under the contract, Mr.Umbehr did not in fact haul trash for the county. Rather, the contract provided that Mr. Umbehr could haul trash for cities in the county, at a rate specified in the contract, provided each city endorsed and ratified the contract. No city was under any obligation to ratify the contract. Each city had the right to opt out of the contract on ninety days' notice. The contract itself was automatically renewed

for successive one-year terms, unless either party gave sixty days' notice of termination or ninety days' notice of intent to renegotiate. The contract further provided that, during its term, the county and each city which approved the contract agreed not to contract with "any other individual or firm to provide solid waste removal from residential premises in any [c]ity." Appellees' App. at 139.

Mr. Umbehr hauled trash for six of the seven cities in the county from 1985 until the county terminated the contract in 1991. In other words, the contract was automatically renewed each year, according to its terms. Throughout this time period, Mr. Umbehr spoke out at county commission meetings and wrote letters and columns in local newspapers about a variety of topics, including landfill user rates, the cost of obtaining county documents from the county, alleged violations by the county commission

of the Kansas Open Meetings Act, and a number of alleged improprieties, including mismanagement of taxpayer money, by the county road and bridge department.

Defendants Joe McClure, Glen Heiser, and George Spencer were all members of the Wabaunsee County Commission in 1990, when the commission voted to terminate the contract with Mr. Umbehr. Mr. Spencer and Mr. Heiser voted for termination, whereas Mr. McClure voted against termination. In fact, the attempted termination was not valid, and the contract continued for another year, until it was validly terminated in January 1991. At the time the contract was terminated, Mr. McClure was no longer on the county commission. His replacement on the commission voted not to terminate the contract, whereas Mr. Spencer and Mr. Heiser again voted in favor of termination. Mr. Umbehr subsequently entered into separate contracts to haul trash with five of the six cities he

had previously served. The county did not enter into any other contracts involving trash hauling.

Mr. Umbehr brought suit against Defendants, claiming that they caused the termination of his contract with the county in retaliation for his outspoken criticism of the county and the county commission, thereby violating his First Amendment right of free speech. He sued Defendants Heiser and Spencer in both their official and individual capacities. He sued Defendant McClure only in his individual capacity. Defendants filed motions for summary judgment. The district court assumed, solely for the purpose of its decision, that Mr. Umbehr "would have been protected from termination in retaliation for his statements" had he been a government employee, that his "comments did motivate the votes in favor of terminating [Mr. Umbehr's] contract with Wabaunsee County," and that he suffered damages as a result of the

termination. *Umbehr v. McClure*, 840 F.Supp. 837, 839 (D.Kan.1993). It then granted Defendants' motion for summary judgment on the ground that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." *Id.* The court expressly declined to rule on Defendants' claim that their actions were protected by legislative immunity, but held, alternatively, that Defendants were entitled to qualified immunity from damages for their actions. Finally, the district court held that Mr. McClure was additionally entitled to summary judgment because there was "insufficient evidence which proves that defendant McClure caused the termination of the contract." *Id.* at 841.

DISCUSSION

Summary judgment is appropriately granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "We review a district court's summary judgment determination de novo, viewing the record in the light most favorable to the nonmoving party." *Artes-Roy v. City of Aspen*, 31 F.3d 958, 961 (10th Cir.1994).

[1] Although neither party has raised this issue, we first determine whether Mr. Umbehr has standing to bring this case. Standing is a threshold issue, "jurisdictional in nature." *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir.1993). "For standing to exist, the plaintiff must 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82

L.Ed.2d 556 (1984)). The alleged injury "must be 'distinct and palpable,' *Warth v. Seldin*, 422 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), as opposed to abstract, conjectural, or merely hypothetical." *Id.* (parallel citations omitted).

[2] We conclude that Mr. Umbehr has standing. Mr. Umbehr asserts a violation of his First Amendment rights--punishment, in the form of termination of a contract beneficial to him, because of his speech. While Defendants assert that the contract provided no benefit to the county, from which one could infer that its termination could inflict no injury on the county, Mr. Umbehr has alleged a benefit to him from the contract.[1] The contract obviated the need

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[1]Mr. Umbehr does not claim, nor need he, that he has a property interest in his contract. "[T]he Supreme Court has held a property right is not required for a first

(Cont'd)

for him to individually negotiate a trash hauling contract with each city; it gave him the exclusive right to haul trash for cities that ratified the agreement; and it gave him, for at least sixty days, the right to haul trash for cities pursuant to the agreement, inasmuch as the county could only terminate the contract on sixty days' notice.[2]

(Cont'd)

amendment retaliation claim." *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1233 (10th Cir.1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)). In *Perry*, the Court made the following widely quoted statement:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech.

Perry, 408 U.S. at 597, 92 S.Ct. at 2697.

[2]Cities bound by the contract could only opt out on ninety days' notice.

Cf. Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 476 (9th Cir.1991) (holding that private contract providing for immediate termination for cause or at will termination on ninety days' notice "gave rise to a 'legitimate claim of entitlement' to ninety days of continued employment"). Further, he claims monetary injury from the termination of the contract, and there is no dispute that any such injury is "'fairly traceable'" to Defendants' actions in terminating the contract. *Doyle*, 998 F.2d at 1566 (quoting *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324). He has clearly alleged an injury caused by Defendants. Accordingly, Mr. Umbehr has standing. We turn now to the merits of his claim that his First Amendment rights have been violated.

Mr. Umbehr was indisputably an independent contractor. As the district court acknowledged, there is conflicting case law on whether those who independently contract

with the government share the same degree of First Amendment protection for their speech as government employees.[3] A number of courts have held that governments may award or terminate public contracts on the basis of political affiliation or support. See *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir.1989) (holding that

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[3]A public employee speaking on a matter of "public concern" is protected from an adverse employment decision if "the interests of the [employee], as a citizen, in commenting upon matters of public concern [outweigh] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968), and if the employee proves that the protected speech was a "motivating factor" in the adverse employment decision. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *see also Bisbee v. Bey*, 39 F.3d 1096, 1100 (10th Cir.1994). Speech on matters of public concern has been defined generally as speech "relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). For example, speech disclosing governmental wrongdoing or misconduct is generally of public concern.
(Cont'd)

independent contractor claiming loss of and denial of contracts because of political affiliation was not protected by First Amendment), *cert. denied*, 498 U.S. 845, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir.1983) (holding that independent contractor claiming denial of public contract because of political affiliation was not protected by First Amendment), *cert. denied*, 464 U.S. 1044, 104 S.Ct. 712, 79 L.Ed.2d 175 (1984); *Horn v. Kean*, 796 F.2d 668 (3d Cir.1986) (en banc) (holding that independent contractors whose contracts were terminated following a change in administration were not protected by the First Amendment); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.) (holding that fee agents who were not employees but were "'more in the nature of independent contractors'" who were

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(Cont'd)

See, e.g., Walter v. Morton, 33 F.3d 1240, 1243 (10th Cir.1994); *Wulf v. City of Wichita*, 883 F.2d 842, 857 (10th Cir.1989).

dismissed following a change in administration were not protected by the First Amendment), *cert. denied*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982); *Ambrose v. Knotts*, 865 F.Supp. 342, 345 (S.D.W.Va. Oct. 17, 1994) (holding that independent contractor claiming termination of contract in retaliation for petition was not protected by First Amendment); *O'Hare Truck Serv., Inc. v. City of Northlake*, 843 F.Supp. 1231, 1234 (N.D.Ill.1994) (holding that independent contractor claiming removal from city towing rotation list because of political affiliation was not protected by First Amendment); *Inner City Leasing and Trucking Co. v. City of Gary*, 759 F.Supp. 461, 464 (N.D.Ind.1990) (holding that independent contractor claiming termination of contract because of political affiliation not protected by First Amendment); *MEDCARE HMO v. Bradley*, 788 F.Supp. 1460, 1464-66 (N.D.Ill.1992) (holding that independent

contractor claiming termination of contract because of lobbying and other political activities not protected by First Amendment); *see also Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir.), *vacated*, 882 F.2d 207 (6th Cir.1989), reinstated in pertinent part, 924 F.2d 627 (6th Cir.1991) (en banc) (holding that it was not clearly established that independent contractor claiming denial of public contract because of political affiliation was protected under First Amendment), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991). But *see Horn*, 796 F.2d at 680-85 (Gibbons, Sloviter, Mansmannt, Stapleton, JJ., dissenting) (rejecting view that independent contractors can be treated differently than employees for First Amendment purposes).

Our own circuit has suggested, without analysis, that independent contractors do enjoy protection against retaliation for the exercise of First Amendment rights.

Abercrombie, 896 F.2d at 1233. In *Abercrombie*, the Plaintiff was the owner of a wrecker business who received referrals from the City of Catoosa police chief. The Plaintiff had received all wrecker referrals from the police for a period of time, but after testifying in court as a witness in a suit against the city, he no longer received all wrecker referrals; instead he shared them with another wrecker company. After campaigning on behalf of a mayoral candidate running against the incumbent mayor, the Plaintiff was removed entirely from the police department's wrecker rotation log. He brought a section 1983 action against the city, the police chief, and the mayor, claiming, inter alia, that he had been deprived of a property interest without due process and that Defendants had retaliated against him for the exercise of his First Amendment rights.

After concluding that the Plaintiff had a property interest in wrecker referrals pursuant to applicable state statutes, we also concluded that the district court erred in granting judgment notwithstanding the verdict on his First Amendment retaliation claim. We gave little reasoning, however, simply stating:

> The district court dismissed the entire Section 1983 claim because it found that plaintiff did not have a property right in continued wrecker referrals. But, as noted above, plaintiff did have a property right in equal referrals. Furthermore, the Supreme Court has held a property right is not required for a first amendment retaliation claim.

Id. at 1233 (citing *Perry*, 408 U.S. 593, 92 S.Ct. 2694). Thus, we simply assumed that an independent contractor could assert a First Amendment retaliation claim.

Other circuits have provided a more detailed analysis of the issue, in reaching the opposite conclusion. The Seventh Circuit in *LaFalce* and the Third Circuit in *Horn*

provided the clearest explanation of the reasoning behind those decisions holding that independent contractors enjoy no First Amendment protection when their contracts are terminated or they do not receive government contracts because of their exercise of First Amendment rights.[4] Two broad rationales animated those decisions: (1) the history and legal treatment of patronage practices in government employment; and (2) perceived distinctions between the economic status and interests of independent contractors and employees. We examine each in turn.

As the Horn majority observed, the practice of political patronage is a "centuries' old" and "historically established and traditionally accepted characteristic[ ] of government, be it on a municipal, county, state, or federal level." *Horn*, 796 F.2d at

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[4]Virtually all of the other cases cited above specifically followed the *Horn* and *LaFalce* decisions.

672, 673; *see also LaFalce*, 712 F.2d at 294 ("Patronage in one form or another has long been a vital force in American politics."). At the time *Horn* and *LaFalce* were decided, only two Supreme Court cases had addressed the propriety of that long-established practice. In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), a divided Supreme Court held that a government employer could not discharge a nonpolicymaking, nonconfidential employee solely because of the employee's political beliefs or affiliation. *Id.* at 375, 96 S.Ct. at 2690 (Stewart, J., concurring). A clear majority in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), reaffirmed that principle, but specifically stated that both *Elrod* and *Branti* dealt only with "the dismissal of public employees for partisan reasons." *Branti*, 445 U.S. at 513 n. 7, 100 S.Ct. at 1292 n. 7. The Court noted that among the many practices falling

within the broad definition of a patronage system was "granting supporters lucrative government contracts" but stated that neither Elrod nor Branti involved such practices.

Thus, as the *Horn* majority stated, "We perceive neither authority nor inkling in these decisions to extend first amendment protection beyond stated circumscriptions." *Horn*, 796 F.2d at 674; *see also LaFalce*, 712 F.2d at 294-95 ("We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*.").

As indicated, the *Horn* and *LaFalce* courts also relied upon presumed practical and economic differences between independent contractors and employees as a basis for finding no violation of contractors' First Amendment rights:

> [M]ost government contractors also have private customers. If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent and the

> state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job. Of course, the contrast can be overstated; unless the government worker who loses his job cannot find another job anywhere, the loss will not be a total catastrophe.... An independent contractor would tend we imagine to feel a somewhat lesser sense of dependency.

LaFalce, 712 F.2d at 294.[5] The Seventh Circuit further observed that "[m]any firms that have extensive government business are political hermaphrodites," and that extending *Elrod* and *Branti* First Amendment protection to independent contractors "would invite

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[5]*Horn* involved independent contractors (motor vehicle agents) most of whom in fact were minimally dependent on their contractual arrangements with the government. The court was therefore able to avoid what it called "the emotionally-charged scenario posed at oral argument: Whether the first amendment would protect from politically-motivated discharge an independent contractor with substantial economic dependence on the state, e.g., a one-person shoeshine stand in a public building." *Horn*, 796 F.2d at 675 n. 9.

every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.*; *see also Horn*, 796 F.2d at 675.

Thus, of the two broad rationales behind *Horn* and *LaFalce*--that the Supreme Court has restricted patronage practices sparingly and only in connection with employees, and that independent contractors have a different economic status vis-a-vis the government than do employees--the first one arguably supports the decisions permitting the award or termination of public contracts on the basis of political affiliation. The question remains whether it supports the termination of government contracts in retaliation for speech on matters of public concern, particularly in light of the Supreme Court's most recent case involving patronage practices, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

In *Rutan*, the Court extended *Elrod* and *Branti* to hold that "promotions, transfers, and recalls after layoffs based on political affiliation or support" impermissibly infringe the First Amendment rights of public employees. *Rutan*, 497 U.S. at 75, 110 S.Ct. at 2737. The *Rutan* Court's reasoning undermines part of the Seventh and Third Circuits' rationales in their independent contractor cases. The Court dismissed the argument that expanding the protections of *Elrod* and *Branti* would lead to "excessive interference [in state employment] by the Federal Judiciary." *Id.* at 75 n. 8, 110 S.Ct. at 2738 n. 8.

The Court further explained that governmental interests in efficiency and effectiveness can still be preserved by "discharging, demoting, or transferring staff members whose work is deficient" and by permitting the selection or dismissal of "certain high-level employees on the basis of

their political views." *Id.* at 74, 110 S.Ct. at 2737. The Court stated the overriding principle as follows: "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Id.* at 76, 110 S.Ct. at 2738. It therefore "precludes the government from accomplishing indirectly" that which it cannot command directly. *Id.* at 77-78, 110 S.Ct. at 2738-39 (citing *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697). Arguably, in permitting governments to terminate a public contract because of the contractor's speech, courts have permitted governments to accomplish indirectly that which they cannot accomplish directly--punishment of speech that they do not like. Indeed, it is indisputable that in its role as sovereign, the government cannot punish or otherwise burden the speech of

citizens criticizing the government, except in very limited circumstances. Under current Supreme Court jurisprudence, the government, in its role as employer, can only punish or burden speech of its employees criticizing the government when it shows that such speech interferes with the government's ability to function. In permitting just that kind of punishment or burdening of speech by independent contractors, courts accord those who contract with the government a lesser degree of First Amendment protection than ordinary citizens enjoy vis-á-vis their government or than government employees enjoy vis-a-vis their employer.

Nonetheless, the Seventh Circuit has adhered to its *LaFalce* and *Triad Associates* precedents, even after *Rutan*. In *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 657 (1991), the court held that a city did not violate

the First Amendment when it terminated a lease with an independent contractor who had lobbied against it. The court stated: "We continue to concur in the view taken by the other circuits, and hold that political favoritism in the awarding of public contracts is not actionable." *Id.* at 710. The court held to this view despite acknowledging that, while *Rutan* directly addressed only government employees, its "scope ... and [the] rationale behind it, seem to be at odds with the holding of *LaFalce* and *Triad*." *Id.* at 709. In our view, *Rutan* has indeed undermined the rationale for *Horn* and *LaFalce* that relied upon the Supreme Court's reluctance to extend *Elrod* and *Branti*.

The other rationale behind *LaFalce* and *Horn* was premised on differences between public employees and independent contractors. Some of these differences are open to question, while others are undeniably true. Whether or

not these are relevant distinctions, for example, independent contractors generally have more discretion and control over the performance of their jobs than do employees, and in that respect some may be more like the high-level policymaking employees who are still subject to patronage dismissals under *Rutan*, *Elrod*, and *Branti*. See *Vickery v. Jones*, 856 F.Supp. 1313, 1325 (S.D.Ill.1994) ("Thus, like high-level employees, independent contractors do not have supervisors and can be hired or dismissed on the basis of political affiliation to ensure that their work is done in accordance with the party's philosophies."). Still others function in a way very similar to employees. *See Smith v. Cleburne County Hosp.*, 870 F.2d 1375, 1381 (8th Cir.) (applying *Pickering* balancing test to denial of medical staff privileges when "there is an association between the independent contractor doctor and the Hospital that have similarities to that

of an employer-employee relationship"), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 100 (1989).

On the other hand, much of the *LaFalce* and *Horn* rationale for treating independent contractors differently from employees rests on the assumption that independent contractors have less at stake than an employee, and the loss of a contract is less devastating than the loss of a job. While that is undeniably true in some cases, as it was in *Horn*, we have seen no empirical data that it is always or even usually the case. *See Horn*, 796 F.2d at 681 n. 1 (Gibbons, C.J., dissenting) ("There is no empirical evidence that independent contractors, especially those involved in providing personal services, are as a group less dependent on the government for work than are public servants."). And with the increasing "privatization" of government, more and more of the government's work is accomplished

through independent contractors, thereby increasing both the number and variety of such contractual arrangements.

We of course recognize that there is a long and vital tradition of treating independent contractors differently from employees in many legal contexts. In this First Amendment context, we reject any categorical distinctions based on whether independent contractors have more or less of an economic interest in their governmental contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant. There is little justification for a rule that the magnitude of the loss determines whether an individual's First Amendment rights have been violated. As the dissenting opinion in *Horn* pointed out, "The constitutional wrong condemned in *Elrod* and *Branti* was the state's attempt to control the beliefs and associations of its citizens. That control

can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent." *Id.* at 683 (Gibbons, C.J., dissenting) (citations omitted). And *Rutan*'s extension of protection against patronage practices to a variety of employment practices short of dismissal undermines the argument that only the complete loss of one's job merits First Amendment protection.

[3-5] In sum, of the two rationales behind decisions such as *LaFalce* and *Horn*, which deny independent contractors the First Amendment protections enjoyed by public employees, the first rationale--the Supreme Court's cautious restriction of patronage practices in government employment--has been undermined by *Rutan* and has limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern. The second

rationale--presumed differences between the status of independent contractors and employees--is of questionable empirical validity and of dubious relevance to the question of whether First Amendment rights have been violated. Neither one explains why independent contractors should be given less First Amendment protection than either ordinary citizens or government employees. We therefore specifically hold, as we assumed in *Abercrombie*, that an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be. Thus, the *Pickering* balancing test would apply to such a retaliatory action.[6] We realize that this decision places us squarely in conflict with several other circuits, a posture we do not adopt lightly. We also agree with the

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[6]We recognize that, in Mr. Umbehr's case, damages may be small and difficult to prove.

Seventh and Third Circuits that this is an area in which Supreme Court guidance is particularly needed.

[6] The district court also held Defendants qualifiedly immune under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." We agree that Defendants should be qualifiedly immune from Mr. Umbehr's claim for damages against them in their individual capacities, given the uncertainty in this area of law. We also affirm the district court's conclusion that there is insufficient evidence proving that Defendant McClure, who was no longer on the county commission when Mr. Umbehr's contract was not renewed, and who in any event had voted earlier not to terminate the contract, caused Mr. Umbehr's

injury. We therefore agree that summary judgment was properly granted to him.

[7] Furthermore, Defendants have raised the issue of absolute legislative immunity, which the district court observed was a "close question." Mr. Umbehr sued Defendants Heiser and Spencer in both their official and individual capacities. In their individual capacities, we have held that they are entitled to qualified immunity. An official capacity suit is just "another way of pleading an action against an entity of which an officer is not an agent." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2036 n. 55, 56 L.Ed.2d 611 (1978). As the Supreme Court has stated, "[t]he only immunities that can be claimed in an official capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Kentucky v. Graham*, 473 U.S.

159, 167, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985).

Accordingly, we REVERSE and REMAND this case for further proceedings consistent herewith. All pending motions are DENIED.

No. _____

In The
Supreme Court of the United States
October Term 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX B -- District Court DECISION
840 F.Supp. 837 (D.Kan.1993)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Keen A. UMBEHR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 91-4081-RDR
	)	
Joe McCLURE,	)	
Glen Hiser,	)	
and George Spencer,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This is an action under 42 U.S.C. § 1983. Plaintiff alleges that defendants, as members or ex-members of the Wabaunsee County Commission, voted or helped cause a vote to terminate plaintiff's trash hauling contract in retaliation for plaintiff's exercise of his right to free speech. This case is now before the court upon defendants' motion for

summary judgment. For the reasons which follow, the motion shall be granted.[1]

Summary Judgment Standards

The general guidelines for analyzing summary judgment motions were reviewed by the Tenth Circuit in Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1414 (10th Cir.1993):

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L.Ed.2d 202, 106 S.Ct. [2505, 2509 (1986); Russillo v. Scarborough, 935 F.2d 1167, 1170] (10th Cir.1991). The moving party bears the initial burden of showing that there is an absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L.Ed.2d 265, 106 S.Ct. 2548 [, 2552] (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). If the moving party meets this

[1]This case was placed upon a trial calendar for January 31, 1994 while this motion was still pending. A motion to continue the trial setting, which was recently filed, is moot by reason of this order.

> burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L.Ed.2d 538, 106 S.Ct. 1348 [, 1355-56] (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991). To sustain this burden, the non-moving party cannot rest on the mere allegations in the pleadings. Fed.R. Civ. P. 56(e); Celotex, 477 U.S. at 324[, 106 S.Ct. at 2553]; Applied Genetics Int'l v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

Uncontroverted Facts

The following facts appear uncontroverted. During the relevant times in this case, plaintiff was not an employee of Wabaunsee County, Kansas. Plaintiff operated a trash hauling business. He had a contract with Wabaunsee County, although the contract did not involve plaintiff hauling trash for Wabaunsee County. The contract originated on April 7, 1981 and was redone on February 11, 1985. Under the 1985 contract, a trash hauling rate was established. Plaintiff

agreed to haul trash at the established rate for six cities in Wabaunsee County (Alma, Alta Vista, Eskridge, Harveyville, Paxico and McFarland) provided that those cities approved and endorsed the contract. The cities were not required to endorse the contract. If a city did endorse the contract, then plaintiff alone had the franchise to haul trash for that city at the rate established in the contract. Plaintiff was not paid by Wabaunsee County for hauling trash for the cities in the county. Plaintiff was paid by the cities on a per residence basis. One city in Wabaunsee County, Maple Hill, was never part of the contract.

The contract provided that it would renew automatically for successive one-year terms unless either party notified the other in writing of the intent to terminate at least sixty days prior to the end of the

contract's annual term. After the Wabaunsee County Commission terminated the contract in 1991, the city of Alta Vista contracted with a different trash hauling company after seeking competitive bids. Plaintiff retained the trash hauling business of the other cities for which he had hauled trash before the contract was terminated.

In 1990, when defendants Spencer, Heiser and McClure were members of the Wabaunsee County Commission, a vote was taken to terminate the contract with plaintiff. Spencer and Heiser voted in favor of termination; McClure voted against. However, notice of the termination was not made to plaintiff in a timely fashion. So, the contract continued through 1990. Defendant McClure's term as a county commissioner expired on January 14, 1991. On January 28, 1991, another vote was taken to terminate the contract with plaintiff. Defendants Spencer

and Heiser voted in favor of termination; defendant McClure's replacement on the commission, a Mr. Anderson, voted against termination. This time plaintiff was given timely notice of the intent to terminate the contract.

Throughout the 1980s and in 1990, plaintiff spoke out on many issues. These issues included: landfill user rates; the cost of obtaining copies of county documents from the county; alleged violations of the Kansas Open Meeting Act; and practices of the county road and bridge department. Plaintiff made oral comments before the county commission and also wrote letters or columns which appeared in some newspapers published in the county.

Arguments for Summary Judgment

Defendants' motion for summary judgment raises many arguments, not all of which will be decided in this order. The court will not

attempt to decide upon summary judgment many of the factors relevant to an analysis, under Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) or Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), of whether expression by a government employee is protected by the First Amendment. In other words, the court will assume solely for the purposes of this order that if plaintiff had been a government employee, he would have been protected from termination in retaliation for his statements. The court will also assume for the purposes of this order that plaintiff's comments did motivate the votes in favor of terminating plaintiff's contract with Wabaunsee County. Further, the court shall assume that the termination of the contract caused damages to plaintiff. Finally, the court shall not grant summary judgment on the grounds of legislative

immunity, although this appears somewhat of a close question which the court would examine closely if this case were tried. Nevertheless, the court shall grant summary judgment to defendants for the following reasons.

First Amendment

We hold that the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term. There may be a split of authority in this area. But, the court will side with the majority of courts which do not extend to independent contractors the same First Amendment protections granted to government employees.

The Seventh Circuit has held in LaFalce v. Houston, 712 F.2d 292 (7th Cir.1983) cert. denied, 464 U.S. 1044, 104 S.Ct. 712, 79

L.Ed.2d 175 (1984) and Triad Assoc., Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir.1989) cert. denied, 498 U.S. 845, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990) that the First Amendment does not forbid a government agency from using political criteria in awarding contracts to independent contractors. The appellate court distinguished political patronage cases like Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) on the grounds that independent contractors are less dependent on government jobs than are public employees. It was also noted that independent contractors can work both sides of the political fence and that a contrary rule would invite a First Amendment lawsuit from every disappointed bidder for a government contract.

The Seventh Circuit reiterated its position in Downtown Auto Parks, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.) cert. denied, --- U.S. ----, 112 S.Ct. 640, 116 L.Ed.2d 657 (1991). In this case, the governmental defendant refused to renew a lease with the plaintiff parking facility operator, allegedly because of the plaintiff's lobbying efforts against a proposed change in state law which would have permitted the defendant to retain companies to manage parking lots without leasing them. The plaintiff tried to distinguish previous Seventh Circuit cases on the grounds that this was not a bidding situation (instead, plaintiff had a lease which was not renewed), and also because plaintiff was claiming retaliation against free speech rights, not political affiliation. The Seventh Circuit denied the force of both distinctions. The court also held that the extension of Elrod

and Branti in Rutan v. Republican Party of Illinois, 497 U.S. 1050, 111 S.Ct. 13, 111 L.Ed.2d 828 (1990) made no difference in the case. In conclusion, the court held that "plaintiff's First Amendment claim must be dismissed because the City was not prohibited from allowing politics to influence its decision not to award a contract to plaintiff." 938 F.2d at 710.

Other circuit courts have made similar rulings. In Horn v. Kean, 796 F.2d 668 (3rd Cir.1986), the court held that New Jersey motor vehicle agents were independent contractors who could be replaced on the basis of their political affiliation. In Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982), the court held that a city's mayor could deny a public contract to an accounting firm which had previously had the contract, because of the firm's political affiliation. See also, Sweeney v. Bond, 669 F.2d 542 (8th

Cir.) cert. denied, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982). This line of authority has also been followed in: Blankman v. County of Nassau, 819 F.Supp. 198, 205 (E.D.N.Y.1993) (developer alleged denial of development opportunity because of opposition to county policies); Nu-Life Construction Corp. v. Board of Education, 809 F.Supp. 171, 182 (E.D.N.Y.1992) (contractor cannot claim First Amendment violation for allegedly retaliatory initiation of a board of review proceeding against the contractor); Medcare HMO v. Bradley, 788 F.Supp. 1460, 1464-1466 (N.D.Ill.1992) (no cause of action for cancellation of contract allegedly in retaliation for lobbying activities).

Plaintiff has cited three cases to counter this line of authority. Two of the cases, Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir.1983) and Sisk v. Texas Parks & Wildlife Dept., 644 F.2d 1056 (5th Cir.1981),

involve the alleged denial of a liquor license and a commercial fishing license in a manner which discriminates against protected expression. We believe these cases can be distinguished from the case at bar. Like government employees, a bar owner seeking a liquor license and a commercial fisherman seeking a fishing license are much more dependent upon the government for their livelihood than plaintiff was dependent upon the contract with Wabaunsee County for his livelihood. The final decision as to whether plaintiff supplied trash service for a city rested with the city, not Wabaunsee County. The decision to terminate the contract between Wabaunsee County and plaintiff did not prevent plaintiff from contracting with the cities individually to provide trash service.

The third case cited by plaintiff is North Mississippi Communications, Inc. v.

Jones, 792 F.2d 1330 (5th Cir.1986). There, the court held a cause of action was stated by a newspaper publisher that claimed defendants retaliated against the newspaper's critical stories by giving defendants' legal advertisement business to another publisher and by threatening other commercial advertisers. The instant case may be distinguished on its facts since the cities of Wabaunsee County, not the County itself, decided whether plaintiff received their business. Thus, while we assume that the termination of the contract was a contributing cause to a loss of business, it was not an independent cause. In contrast, the defendants in the North Mississippi Communications case allegedly exercised sole discretion over the legal advertisement business of the plaintiff.

In conclusion, we are persuaded by the majority of the above-cited cases that

plaintiff, as an independent contractor, cannot claim that his First Amendment rights were violated by the alleged retaliatory termination of his contract with Wabaunsee County, especially when that contract was neither a necessary condition for plaintiff to do business nor a guarantee that plaintiff would receive trash hauling business from the cities of Wabaunsee County.

Qualified Immunity

Under the doctrine of qualified immunity, summary judgment must be granted against any damages claim plaintiff has against defendants for actions taken in their capacities as government officials. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) holds that government officials cannot be made liable for civil damages under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which

a reasonable person would have known." We do not believe it was clearly established in 1991 that the First Amendment prohibited defendants from acting to terminate plaintiff's contract with Wabaunsee County because of his public comments. Therefore, defendants are entitled to qualified immunity from damages for any actions taken by them as public officials. See Lundblad v. Celeste, 874 F.2d 1097 (6th Cir.1989) modified on other grounds on rehearing, 924 F.2d 627, cert. denied, --- U.S. ----, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991) (qualified immunity granted against First Amendment claim of bidder on contract to operate a golf course at a state park).

McClure

Finally, we believe there is an independent reason to grant summary judgment to defendant McClure, since he was not on the Wabaunsee County Commission when the contract

with plaintiff was terminated. We believe there is insufficient evidence which proves that defendant McClure caused the termination of the contract. See Papapetropoulous v. Milwaukee Transport Services, Inc., 795 F.2d 591, 595 (7th Cir.1986) (an individual cannot be liable under § 1983 unless he caused or participated in the alleged constitutional deprivation).

In reaching this conclusion, we shall assume that defendant McClure did not agree with plaintiff's public comments. We shall further assume that defendant McClure had expressed animosity toward plaintiff and supported the termination of the contract with plaintiff during and after his term as county commissioner. Still, defendant McClure did not vote for the termination of the contract as a member of the Wabaunsee County Commission and was not on the Commission when the vote was taken which

actually terminated the contract. The vote to terminate the contract is the alleged constitutional violation in this case. Defendant McClure did not participate in it. Nor is there evidence that defendant McClure committed any act to interfere with the independent judgment of the other commissioners so that his action became a probable cause of the vote to terminate the contract. We do not believe advocacy in favor of the vote provides a sufficient basis for liability. Otherwise, a cause of action might exist against anyone who used rhetoric to promote or encourage an alleged constitutional violation by a state actor. Obviously, this could chill the same First Amendment rights which plaintiff seeks to enforce.

In conclusion, because the record does not support a reasonable basis to believe defendant McClure caused or participated in the alleged retaliatory act in this case, an

independent reason exists to grant defendant McClure summary judgment.

Conclusion

For the above-stated reasons, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Dated this 30th day of December, 1993 at Topeka, Kansas.

/s/Richard D. Rogers
United States District Judge

APPENDIX C -- TENTH CIRCUIT ORDER DENYING PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEEN A. UMBEHR, Plaintiff-Appellant, JOE McCLURE, GLEN HISER and GEORGE SPENCER, Defendants - Appellees.	)	No. 94-3022

ORDER
Entered February 10, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, Circuit Judges,and CAMPOS,* District Judge.

*The Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for hearing is denied by the panel that rendered the decision.

Appendix C

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ L. Bahzans
Deputy Clerk

No. 94-1654

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GLEN HEISER AND GEORGE SPENCER,

Petitioners,

v.

KEEN A. UMBEHR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment protects independent contractors from termination or other adverse action based on the content of their speech.

2. If so, whether the *Pickering* balancing test employed in the public employment context applies to adverse actions against independent contractors.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GLEN HEISER AND GEORGE SPENCER,

Petitioners,

v.

KEEN A. UMBEHR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

The Respondent, Keen A. Umbehr, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision rendered by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Petitioners' Appendix (App.) 1a-33a, is reported at 44 F.3d 876. The decision of the court of appeals denying Petitioners' petition for rehearing and suggestion for rehearing in banc

is noted at 44 F.3d 876 and is reprinted in Petitioners' Supplemental Appendix (Supp. App.) 53a-54a. The opinion of the district court, Supp. App. 34a-52a, is reported at 840 F. Supp. 837.

Petitioners also have cited a separate action, which they incorrectly describe as a "[p]arallel proceeding[ ] in state court between the same parties," as one of the "Opinions Below." Petition for Writ of Certiorari (Petition) at 1. The cited state court action is unrelated to the matter before this Court and raises no First Amendment or other federal issues. Accordingly, it is improperly listed in the Petition. Sup. Ct. R. 14(.1)(c).

STATEMENT OF THE CASE

Respondent brought suit against the County Commission of Waubunsee County, Kansas, through its individual members, in May of 1991, alleging that the Commissioners terminated the parties' ten-year contractual relationship based solely on Respondent's public criticism of the manner in which the Commission conducted its official responsibilities. The district court granted summary judgment to Petitioners, concluding that governmental entities may, without transgressing the First Amendment, predicate the award of government contracts on the content of an individual's speech. The court of appeals reversed, finding that independent contractors are entitled to First Amendment protection from retaliation when engaging in speech on matters of public concern.

A. Statement of Facts

In 1981, Respondent bid on and obtained a contract to collect residential refuse in six rural communities within Waubunsee County Kansas. App. 2a. The contract, which was renegotiated in 1985, automatically renewed each year unless either party provided sixty (60) days notice of an intent to terminate. App. 2a-3a. After ratifying the agreement, each of the six communities had the right to opt out of the agreement on ninety (90) days notice. App. 2a. Respondent provided uninterrupted residential collection to the citizens of the County, without any complaints about the quality of his service, for a period of almost ten years.

Although Respondent was an active participant in local public affairs throughout this period, in early 1989, he initiated a series of public comments concerning county government in letters to the editor, at meetings of the County Commission, and in a weekly newspaper column that he authored for the local newspaper. In his public statements, Respondent expressed views on a wide range of issues concerning matters of keen public interest and debate including: the use of government property for the benefit of private citizens and businesses within the County; alleged mismanagement of taxpayer funds; closed-door sessions of the County Commission, which Respondent maintained were conducted in violation of the Kansas Open Meetings Act (KOMA), K.S.A. § 75-4317, *et seq.*; limitations on access to public records, in violation of the Kansas Open Records Act (KORA), K.S.A. § 45-215, *et seq.*; as well as discussions of what Respondent

perceived as abuses of power by individual County Commissioners. App. 3a-4a.

Respondent's commentary on these issues generated a series of investigations by officials at both the county and state level. The Attorney General of Kansas, for example, initiated an inquiry into the use of county equipment and labor on private projects and the improper use of taxpayer money by employees of the county road and bridge department. The investigation concluded that taxpayer funds and resources had been improperly used by county employees, that county equipment had been used on projects that exhibited only the most limited public purposes, and that loose accounting and administrative practices made it difficult to determine whether county resources were being properly employed. Appellees' Appendix 157-58 (December 29, 1989, opinion of the Attorney General).[1]

A second investigation by the Attorney General regarding the alleged violations of the state open meetings statute resulted in the entry of a consent decree between the State and the County Commission. Appee. App. 160-61. In the September 5, 1989 agreement, the County Commission acknowledged that it had violated the terms of the statute and agreed to abide by its provisions in the future. In addition, the consent decree required that each Commissioner receive a copy of the statute and that the

[1]Citations to Appellees' Appendix (Appee. App.) and Appellant's Appendix (Applt. App.) are to the records submitted to the court of appeals.

Commission hold an open meeting at which the County Attorney would explain the various requirements of the act. *Id.*

Respondent's public criticism of the Commission's policies engendered increasing resentment and hostility from the Commissioners. At one point, the County Commission summoned the editor of the local newspaper to a private meeting to discuss the Commissioners' concerns about the content of the articles the paper was printing. Appee. App. 154. During the public portion of the Commission's meeting, Petitioner Heiser suggested that the paper, which received significant revenue from its designation as the official County newspaper, should "take a second look at what is put in the paper, to avoid anyone getting in trouble." Applt. App. 92. He also advised the paper's management that the articles "should be censored" to ensure that they were "truthful." *Id.* In a front page story appearing shortly thereafter, the editor of the newspaper recounted the exchange and noted that he had never before, in thirty-eight years of publishing, been threatened in this manner. Appee. App. 154.[2]

In February of 1990, the County Commission, without articulating any basis for its decision, voted to terminate Respondent's contract. App. 4a; Appee. App. 164 (minutes of February 5, 1990 meeting). The

[2]During a separate meeting, Respondent asked for permission to address the Commission. Petitioner Spencer asked Respondent, a constituent, whether he was prepared to "get down on [his] knees and beg" for permission to address an elected body during a public meeting. Applt. App. 81.

Commission, however, failed to cite the applicable agreement in its notice of termination and the contract continued pursuant to its terms for another year. App. 4a.

Throughout the course of the ensuing eleven months, Respondent continued to speak out on various local political issues in addition to mounting an unsuccessful campaign for county office. The following year, in January of 1991, the Commission properly exercised the contractual termination provision and revoked the decade-long business relationship between the parties. As a consequence, the contract expired on April 7, 1991. App. 4a.

Following termination of the contract, Respondent submitted individual bids to each of the municipalities formerly covered by the county-wide agreement. Although he was able to obtain contracts with five of the towns, Respondent lost roughly 17 percent of his revenue when one of the cities previously covered by the agreement with the County elected to contract with a different collection service. App. 4a-5a.[3]

B. Proceedings Below

In May of 1991, Respondent filed suit under 42 U.S.C. § 1983 in the United States District Court for the

[3]Petitioners puzzlingly refer to the contractual relationship as "a monopoly." Petition at 10. Petitioners apparently confuse an exclusive contract, in which the parties mutually agree that they will not contract with others for a set period, with a monopoly, in which the supplier has the power to control prices and exclude competition.

District of Kansas against Petitioners in their official and individual capacities and against one of the County Commissioners who had since left office in his individual capacity. Respondent maintained that his contract with Waubunsee County had been terminated in direct retaliation for his public criticisms of the County Commission in violation of his rights under the First and Fourteenth Amendments to the United States Constitution.

On December 30, 1993, the district court granted the County Commissioners' motion for summary judgment. In its decision, the court explicitly assumed that Respondent's allegations were true and that his comments on matters of public importance motivated the County's decision to terminate his contract. Supp. App. 40a. The court further presumed that if plaintiff had been a public employee, the First Amendment would have protected him from any adverse action based upon application of the test established by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Supp. App. 40a. Despite these assumptions, the district court held that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." Supp. App. 41a.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit reversed the district court's judgment. The court concluded that independent contractors are entitled to First Amendment protection for speech on matters of public concern and that

governmental entities may not use their economic relationships as leverage to suppress public criticism of their actions. App. 29a-30a. In reaching this result, the court found that a series of cases from other courts rejecting challenges to the distribution of public contracts based on party affiliation had limited application to cases involving retaliation against independent contractors for speech on matters of public concern. App. 29a.

Relying principally on *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the panel also rejected the contention that there is a difference of constitutional magnitude between the loss occasioned by termination of public employment and the loss suffered by denial or termination of a public contract. App. 25a-29a. As the court observed, governmental efforts to suppress public dialogue and debate "'can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent.'" App. 28a-29a (quoting *Horn v. Kean*, 796 F.2d 668, 683 (3d Cir. 1986) (in banc) (Gibbons, C.J., dissenting)). Based on its findings, the court of appeals reversed the judgment of the district court and remanded for trial.[4]

Petitioners then filed a petition for rehearing and a suggestion for rehearing in banc pursuant to Federal Rule of Appellate Procedure 35(b). On February 10, 1995, the

[4]In light of what it perceived as conflicting authority in other circuits, however, the court of appeals affirmed the district court's grant of qualified immunity to Petitioners in their individual capacities. App. 31a.

panel rejected the petition for rehearing, and, at the same time, "[n]o member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc," the court of appeals denied Petitioners' suggestion of in banc consideration. Supp. App. 53a-54a.

REASONS FOR DENYING THE WRIT

I.

THE COURTS OF APPEALS HAVE CONSISTENTLY CONCLUDED THAT THE FIRST AMENDMENT FORBIDS RETALIATION AGAINST INDEPENDENT CONTRACTORS BASED ON THEIR SPEECH

For nearly 30 years, this Court has drawn clear lines of demarcation in the public employment context between the appropriate First Amendment analysis to be employed in actions involving political affiliation or patronage and those involving retaliation for speech. *Compare Rutan v. Republican Party of Illinois*, 497 U.S. 72 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Elrod v. Burns*, 427 U.S. 347 (1976) *with United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995); *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rankin v. Mcpherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1982); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Although both *Elrod* and *Pickering* stand for the general "proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a

condition of public employment," *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Court has adopted fundamentally different modes of analysis in each setting.

When an employee maintains that an adverse action has been taken based on affiliation with a particular political party, for example, the government must demonstrate that the "patronage practices are narrowly tailored to further vital government interests . . . ." *Rutan*, 497 U.S. at 74. Based on the coercive effects of patronage policies on public employees' political beliefs and associational interests, the Court has held that any perceived governmental interest in allocating positions based on party affiliation is "adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Id.* *See also Branti*, 445 U.S. at 517.

In actions involving alleged retaliation for speech, in contrast, the test is quite different. Although this Court has emphasized that the judiciary must "ensure that citizens are not deprived of fundamental rights by virtue of working for the government," *Connick*, 461 U.S. at 147, it has also recognized that the government has rights as an employer that it does not possess with regard to the citizenry at large. *Waters*, 114 S. Ct. at 1886. Accordingly, while private citizens may obtain First Amendment protection even for speech that does not touch on major issues of the day, the First Amendment protects the speech of public employees only if it involves matters of public concern. *Id.* Moreover, having established that

the speech involves matters of public interest, a court must still find that the employee's interest in participating in public debate outweighs the State's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In an effort to portray the decision of the court of appeals as aberrational, Petitioners conflate these two distinct lines of analysis and compare cases in which independent contractors sought protection from patrongage practices under *Elrod* and *Branti* with cases in which courts applied *Pickering* and its progeny to independent contractors' allegations of retaliation based on speech. Petition at 16-18. The courts of appeals, however, in keeping with the distinctions drawn by this Court in the public employment context, have developed two separate lines of authority regarding the First Amendment rights of independent contractors.

In cases such as this involving allegations that the government has used a contractual relationship to punish speech with which it disagrees, the courts of appeals, almost without exception, have readily acknowledged that independent contractors and others in non-employment relationships with the government are entitled to First Amendment protection from retaliation based on the content of their speech. In addition to the decision of the Tenth Circuit in this case, App. 30a, and in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), three other circuits have determined that independent contractors and other non-employees are protected by the First

Amendment from retaliatory actions premised on their public criticism of government officials.

In *North Mississippi Communication v. Jones*, 792 F.2d 1330 (5th Cir. 1986), the Fifth Circuit held that the First Amendment prohibited local officials from removing the official county designation from a newspaper on the basis of its critical comments about the county government. *Id.* at 1337. Because such economic reprisals would permit governmental entities to accomplish indirectly a result they could never accomplish directly -- the economic punishment of expression -- the Fifth Circuit determined that the county's refusal to advertise in the newspaper based on its outspoken opposition to various governmental policies constituted a violation of the First Amendment. *Id. See also Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) (applying *Pickering* test to speech of contractor providing vending services in state capitol building).

In a more recent decision, the Fifth Circuit found that a tow truck operator who alleged that he had been removed from a police referral list for stranded motorists based on a complaint he lodged with the sheriff stated a claim under the First Amendment. *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995). More significantly, because the plaintiff had neither an employment relationship with the government nor a relationship resembling an employment situation, the court concluded that the government could demonstrate no interest in restricting speech and thus the plaintiff need not meet the test established in *Pickering*, but instead need

only demonstrate that the government had deprived him of a valuable benefit in retaliation for his speech. *Id.* at 934.

Two other circuits have similarly concluded that the First Amendment's free speech protections extend to individuals who, while not in an employment relationship, are engaged in some form of contractual arrangement with the government. In *Havekost v. U.S. Dep't of Navy*, 925 F.2d 316 (9th Cir. 1991), the Ninth Circuit concluded that the *Pickering* test provided an appropriate mechanism for assessing First Amendment claims pursued by an individual who had a license to provide bagging services at a Navy Commissary. *Id.* at 318-19. Likewise, the Eighth Circuit in *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), applied the *Pickering* test to the allegations of a doctor who served as an independent contractor at a county hospital. *Id.* at 1381-82. As a result, Petitioners' contention that the decision of the Tenth Circuit "is inconsistent with the conclusion reached by each of the other circuits," Petition at 15, is simply inaccurate.

The only circuit to take a contrary view is the Seventh Circuit. In *Downtown Auto Parks v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), the court, in a footnote, uncritically extended its previous conclusion that independent contractors are not shielded from patronage practices under the rationale of *Elrod* and *Branti* to an action involving retaliation for speech. *Id.* at 709 n.5. The opinion, however, fails to analyze or discuss the significant differences between the government's interest

in considering party affiliation in contracting situations and its interest, or lack thereof, in using its contractual relations in a retaliatory manner to punish those who express dissenting viewpoints.

In the district court, Petitioners properly characterized the Seventh Circuit's holding in this manner: "Although the term was not used, the only conclusion one can draw is that this is a type of exempt or privileged retaliation." Appee. App. at 656. With all due respect, there is no room within the confines of the First Amendment for a governmental "privilege to retaliate" -- a privilege that would allow government officials to impose what is in essence an economic fine on those who question the wisdom and propriety of their actions.

While a number of courts in addition to the Seventh Circuit have refused to extend the rationale of *Elrod* and *Branti* to independent contractors and have instead held that governmental entities may legitimately disburse government contracts based on party affiliation, App. 11a-14a (citing cases), the court of appeals in this case properly concluded that cases addressing patronage practices are of "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." App. 29a. This Court has consistently differentiated between actions involving patronage practices and those involving infringements on speech, *supra* at 9, and the balancing test it has adopted varies markedly depending on whether the government's employment decision is based on party affiliation or consideration of an employee's speech.

None of the interests advanced in the patronage cases -- ranging from the historical roots of the practice, to promotion of the two-party system, motivation of political participation, and improved political accountability[5] -- is served where, as here, the government retaliates against an individual for his speech. Whatever merit these principles have in the patronage context, they provide no support for the contention that governmental entities are immune from liability when they attempt to punish independent contractors for exercising their right to discuss matters of public concern.

On the contrary, the only interest this Court has recognized in the speech context is the government's interest as employer in preventing disruptions of the workplace and ensuring proper administration of the programs in which the individual is employed. *Waters*, 114 S. Ct. at 1886-87. A blanket rule, such as that advanced by Petitioners, denying independent contractors First Amendment protection even for core political speech permits the suppression of ideas by governmental entities without requiring the government to demonstrate *any* corresponding interest in restricting speech. As Justice Powell, dissenting in *Branti*, recognized, even if patronage dismissals of public employees were constitutionally permissible, employees would still be entitled to First

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[5] *See, e.g., Rutan*, 497 U.S. at 93-96 (Scalia, J., dissenting) (patronage has ancient roots in the Republic and provides party discipline that may improve government efficiency); *Branti*, 445 U.S. at 527-31 (Powell, J., dissenting) (patronage strengthens political parties, motivates citizen participation, and promotes accountability); *Elrod*, 427 U.S. at 379 (Powell, J., dissenting) (same).

Amendment protection from retaliation based on speech because "*no substantial state interest justifie[s] the infringement on speech.*" *Branti*, 445 U.S. at 527 (Powell, J., dissenting) (emphasis added) (citing *Perry v. Sinderman*, 408 U.S. 593 (1972)). The fact that some courts have determined that the First Amendment does not protect independent contractors from adverse actions based on political affiliation, therefore, provides no support for Petitioners' sweeping contention that independent contractors enjoy no First Amendment rights whatsoever.

Two decisions from the Eighth Circuit fully demonstrate the distinction between the two lines of authority. In one case, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982), the court declined to extend *Elrod* and *Branti* to provide independent contractors with protection from termination based on their political affiliation. In the other, *Smith*, 870 F.2d at 1381, the same court found that independent contractors are entitled to protection from retaliation for speech on matters of public concern under *Pickering*. Although Petitioners suggest that the Eighth Circuit has "reach[ed] inconsistent conclusions concerning the rights of independent contractors under the First Amendment," Petition at 16, the decisions reflect not conflicting rulings, but the application of two distinct legal doctrines.

The decision of the court of appeals in this case is only the most recent in a line of appellate decisions finding that governmental entities may not, consistent with the First Amendment, utilize their business relationships with independent contractors to exert a form of economic

coercion over the exercise of the fundamental right to engage in political discourse. Based on the relative consistency of these precedents and the lack of any reasoned analysis by the only Circuit to adopt a contrary approach, this Court's review of the decision rendered by the United States Court of Appeals for the Tenth Circuit is unnecessary.

II.

THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE PRESENTED

Aside from citing each of the decisions involving the First Amendment rights of independent contractors and asserting, inaccurately, that "there does not appear to be a majority view among the Circuits, but only fragmented and mutually inconsistent analysis and conclusions," Petition at 15, Petitioners make little effort to articulate any coherent rationale for questioning the Tenth Circuit's finding that independent contractors, like all citizens, are entitled to engage in speech on matters of public concern without fear of reprisal from government officials. Indeed, one of Petitioners' only substantive critiques of the decision is that it "impose[s] on local units of government the obligation to avoid economic injury to government contractors whose statements on issues of public concern may have irritated public administrators," Petition at 4, -- a broadside that, if anything, supports rather than questions the validity of the judgment.

Petitioners also contend that the decision, by merely creating the potential for First Amendment liability, imposes an unnecessary burden on *government officials*. Petition at 21. To alleviate any concern these officials may have about potentially meritless actions, Petitioners advance a rule of First Amendment jurisprudence that would preclude not only insubstantial claims of retaliation, but any claim brought by an independent contractor alleging retaliation for speech, even those in which the contractor has clearly been terminated for voicing disagreement with those in power. In essence, Petitioners maintain that the administrative cost of determining whether government officials were motivated solely by personal animus or by legitimate, non-retaliatory considerations is too high a price to pay to protect First Amendment freedoms.[6]

This extraordinary assertion -- that core First Amendment values should be sacrificed to a rule of administrative expediency -- finds no support in this Court's precedents and runs counter to the Court's recognition that the First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New*

---

[6]It is important to recall that the district court and court of appeals expressly assumed that Petitioners terminated Respondent's contract in response to his critical comments on matters of public concern. App. 5a-6a. Moreover, Petitioners protestations about the burdens imposed by meritless claims of retaliation are peculiar in the context of this case where there is little dispute that the termination was retaliatory. In any event, the need for and scope of any prophylactic rules may be more appropriately addressed after a final judgment is entered and the factual record has been fully developed.

York Times v. Sullivan, 376 U.S. 254, 270 (1964). Under the peculiar calculus of interests advanced by Petitioners, the speech of independent contractors is never entitled to First Amendment protection and the government may retaliate against contractors for criticizing its policies without ever proffering an explanation for its actions. Had the court of appeals adopted this approach, an entire class of individuals who do business with state and local governments would be deprived of the right to engage in public debate on issues that are vital to our system of self-government and instead would be forced to engage in a form of self-censorship if they wish to retain their economic relationships with the government. Petitioners, therefore, have failed to demonstrate either that the court of appeals reached an inappropriate result or that the decision conflicts with rulings from this Court.

On the contrary, the Tenth Circuit's resolution of this issue is fully consistent with this Court's First Amendment precedents. Although the balancing test applied to First Amendment claims varies according to the context in which they arise, government actions which burden or infringe First Amendment freedoms can only be sustained if the government can establish some legitimate, countervailing interest in regulating speech. *Compare Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (government must demonstrate compelling interest for restrictions on speech) *with Central Hudson Gas & Elec. v. Pub. Serv. Comm.*, 447 U.S. 557, 563-64 (1980) (regulation of commercial speech permissible upon showing of substantial interest) *and Connick*, 461 U.S. at 151 (government, as employer, may in some

circumstances regulate speech that interferes with employment relationship). The court of appeals correctly concluded that a blanket rule denying independent contractors First Amendment protection would permit government officials to restrict speech without demonstrating any offsetting government interest. App. 29a-30a (patronage rationales cannot support restrictions on speech). For the same reason that the Court has prohibited public employers from "us[ing] their authority over employees to silence discourse, not because it hampers public functions, but because superiors disagree with the content of the employees' speech," *Rankin v. McPherson*, 483 U.S. 378, 384 (1987), government officials may not use their contractual relationships to punish speech absent some legitimate basis for believing that the comments may interfere with implementation of the contractual agreement. Accordingly, the Tenth Circuit properly rejected the suggestion that independent contractors enjoy no First Amendment protection regardless of the government's motivation for the adverse action.

The court of appeals also concluded that denying independent contractors First Amendment protection would allow government officials to regulate and control the content of public dialogue indirectly, through their economic relationships, even though the same efforts would be entirely impermissible if attempted directly. App. 23a. This Court has repeatedly held that government benefits cannot be used as a device to control speech:

> [E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow government to "produce a result which [it] could not command directly."

Perry v. Sinderman, 408 U.S. 593, 597 (1972) (citation omitted). *See also Rutan*, 497 U.S. at 77-78. Applying this principle to the present case, the Tenth Circuit concluded that "permitting governments to terminate a public contract because of the contractor's speech [permits] government to accomplish indirectly that which they cannot accomplish directly -- punishment of speech they do not like." App. 23a.

The court of appeals' decision in this case properly resolved the issue presented by ensuring that governmental entities do not use economic coercion to silence or suppress ideas with which they disagree. The holding permits government actors to avoid liability by demonstrating either that their decisions are based on

considerations unrelated to the suppression of speech or that consideration of speech on matters of public concern is necessary to further legitimate governmental interests in the proper administration of its contractual arrangements. The decision strikes a reasonable balance, therefore, between the government's legitimate programmatic interests and the First Amendment rights of independent contractors. Accordingly, review by this Court of the decision by the United States Court of Appeals for the Tenth Circuit is not necessary to correct any legal error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 3, 1995

No. 94-1654

In The

Supreme Court of the United States

October Term, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

JOINT APPENDIX

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U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS (TOPEKA)

Umbehr v. McClure, et al.
Assigned to: Senior Judge Richard D. Rogers

CIVIL DOCKET FOR CASE # 9?-CV-4081

Docket Date	Item No.	Filings – Proceedings
05/15/91	1	COMPLAINT w/designation of place of trial – Topeka, KS; Summons issued (case referred to Magistrate judge Ronald Newman)
06/20/91	6	ANSWER by defts Joe (nmi) McClure, Glen (nmi) Hiser, George (nmi) Spencer to complaint [1-1] (clm) [Entry date 06/21/91]
12/16/91	35	MOTION by defts Joe McClure, Glen Hiser & George Spencer for summary judgment, referred to Richard D. Rogers (clm) [Entry date 12/17/91] [Edit date 10/02/92]
12/16/91	36	MEMORANDUM in support by defendants re: motion for summary judgment, referred to Senior Judge Richard D. Rogers [35-1] (clm) [Entry date 12/17/91]

1/2/92	38	MOTION by plaintiff to extend time to respond to defts' motion for S/J; referred to Senior Judge Richard D. Rogers
1/8/92	39	ORDER ENTERED: by Senior Judge Richard D. Rogers granting pltf's motion to extend time to respond to defts' motion for S/J [38-1]; granted to 3/6/92 (cc: all counsel) (clm)
3/6/92	49	RESPONSE by plaintiff to motion for summary judgment, referred to Judge Sam A. Crow [35-1] (w/ attachments in expandable folder) (cam) [Entry date 03/09/92]
3/11/92	50	MOTION by defendants to extend time to reply to pltf's response to defts' summary judgment referred to Judge Sam A. Crow (cam) [Entry date 03/12/92]
03/18/92	53	ORDER ENTERED: by Judge Sam A. Crow granting defts' motion to extend time to 4/1/92 to reply to pltf's response to defts' summary judgment [50-1] (cc: all counsel) (cam) [Entry date 03/19/92]

03/30/92	54	REPLY BRIEF by defendants in support of their initial brief for summary judgment, referred to Judge Sam A. Crow [35-1] (cam)
9/24/92	57	MOTION by plaintiff for order disqualifying Hon. Sam Crow from case referred to Judge Sam A. Crow (cam) [Entry date 09/25/92]
10/2/92	59	MEMORANDUM AND ORDER: by Judge Sam A. Crow granting pltf's motion for recusal [57-1]. Further Ordered that this case be ret'd to clerk of USDC for reassignment 2 pages (cc: all counsel) (cam)
10/2/92	60	MINUTE ORDER - ENTERED: by Clerk re [59-1] Case transferred to Senior Judge Richard D. Rogers. With transfer of case to Sr. Judge Richard D. Rogers, case number is changed to 91-4081-R (cc: all counsel) (cam)
12/30/93	64	MEMORANDUM AND ORDER: by Senior Judge Richard D. Rogers granting defts' motion for summary judgment [35-1] 10 pages (cc: all counsel) (lak)

12/30/93	65	JUDGMENT BY COURT CLERK ENTERED: re memorandum & order [64-1] granting defts' motion for summary judgment; pltf take nothing, action dismissed on merits & defts Joe McClure, Glen Hiser & George Spencer recover of pltf Keen A. Umbehr their costs of action; dismissing case (cc: all counsel) (lak)
1/26/94	66	NOTICE OF APPEAL by plaintiff from Dist. Court decision re: memorandum & order [64-1], re: judgment [65-1] (cc: all counsel, 10CCA) (lak)

U.S. COURT OF APPEALS
TENTH CIRCUIT

2/7/94	1	[740527] Civil case docketed. Preliminary record filed. Transcript order form due 2/7/94 for Nora Lyon pursuant to R.42.1 Docketing statement due 2/17/94 for Keen A. Umbehr Notice of appeareance due 2/17/94 for George Spencer, for Glen Hiser, for Joe McClure, for Keen A. Umbehr (lwb)
3/16/94	9	[750279] Appellant's brief filed by Keen A. Umbehr. Original and 7 copies. c/s: y. Served on 3/15/94 Oral argument? y., Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 4/18/94 for Joe McClure, for Glen Hiser, for George Spencer (kc)
4/13/94	10	[757418] Appellee's brief filed by George Spencer, Glen Hiser, Joe McClure. Original and 7 copies. c/s: y. Served on 4/11/94 Oral Argument? y, Appendix (2 volumes) filed. Original and appendix copy. Appellant's optional reply brief due 4/28/94 for Keen A. Umbehr (kc)

4/22/94	11	[760277] Appellant's motion filed by Appellant Keen A. Umbehr to extend time to file a reply brief until 5/12/94 [94-3022]. Original and 3 copies; c/s: y (kc)
5/16/94	16	[765959] Appellant's reply brief filed by Keen A. Umbehr. Original and 7 copies. c/s: y. (kc)
6/17/94	17	[774453] Appellee's motion for order permitting filing and serving rebuttal brief or in the alternative for order permitting supplementation of the record on appeal pursuant to rules 10.3. and 10.3.2(b) [94-3022] filed by George Spencer, Glen Hiser, Joe McClure. Original and 3 copies. c/s: y (kc)
6/22/94	18	[775207] Order filed by RLH referring Appellees' motion for order permitting filing and serving rebuttal brief . . . [774453-1] REFERRED TO PANEL ON THE MERITS. Parties served by mail. (kc)
9/21/94	19	[796194] Hearing set for November 1994 Session, at Denver. (sls)

10/24/94	20	[803755] Order filed by PF granting Appellees' motion for general relief (alternative motion permitting filing & serving rebuttal brief, or in the alternative for order permitting supplementation of the record on appeal) [774453-1]. Parties served by mail (sls)
10/31/94	23	[805834] Supplemental appendix filed by Appellee George Spencer, Appellee Glen Hiser, Appellee Joe McClure. Original and 1 copy: c/s: y (kc)
11/15/94	25	[809772] Case argued and submitted to Judges Anderson, Tacha, Campos. (sls)
11/30/94	27	[814075] Appellant's motion filed by Appellant Keen A. Umbehr to file a supplemental brief [94-3022]. Original and 3 copies c/s: y (jtp)
12/6/94	28	[815068] Appellant's motion to file a supplemental brief submitted to panel. (jtp)

12/7/94	29	[815422] Appellees' conditional motion for leave to respond to supplemental brief of appellant [94-3022] filed by George Spencer, Glen Hiser, Joe McClure and submitted to panel. (kc)
1/4/95	30	[821636] Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Anderson, authoring judge; Tacha; Campos. [94-3022] (kc)
1/10/95	31	[823197] Amendment to opinion to show references to the Eighth Circuit on pages 10, 13, and 17, should have referred to the Third Circuit filed by Judges Anderson, Tacha, Campos (mt)
1/17/95	32	[825749] Petition for rehearing in banc [94-3022] filed by George Spencer, Glen Hiser, Joe McClure. Original and 14 copies. c/s: y (jtp)
1/19/95	33	[825750] Document [825749-1] Petition for rehearing in banc filed by Appellee George Spencer, Glen Hiser, Joe McClure submitted to panel. (jtp)

2/10/95	35	[832148] Order filed by Judges Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Campos denying Petition for rehearing in banc [825749-1] (jtp)
2/22/95	36	[834580] Mandate issued. Mandate receipt due 3/24/95 (jtp)
3/6/95	37	[837837] Mandate receipt filed. (kc)
4/14/95	38	[847981] Case filed closed. 4/13/97 (das)
4/19/95	39	[850103] Petition for writ of certiorari filed on 4/3/95 by Appellees George Spencer and Glen Hiser. Supreme Court Number 94-1654. (mt)
5/24/95	40	[861918] Petition for writ of certiorari filed on 5/11/95 by Appellant Keen A. Umbehr. Supreme Court Number 94-1882. (mt)
7/6/95	41	[869956] Supreme Court order dated 6/29/95 granting certiorari filed. (S.C. #94-1654) (mt)

APPENDIX B--District Court DECISION
840 F.Supp. 837 (D.Kan.1993)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Keen A. UMBEHR,	)	
	)	
Plaintiff,	)	Case No. 91-4081-RDR
vs.	)	
Joe McCLURE, Glen Hiser, and George Spencer,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This is an action under 42 U.S.C. § 1983. Plaintiff alleges that defendants, as members or ex-members of the Wabaunsee County Commission, voted or helped cause a vote to terminate plaintiff's trash hauling contract in retaliation for plaintiff's exercise of his right to free speech. This case is now before the court upon defendants' motion for summary judgment. For the reasons which follow, the motion shall be granted.[1]

[1] This case was placed upon a trial calendar for January 31, 1994 while this motion was still pending. A motion to continue the trial setting, which was recently filed, is moot by reason of this order.

Summary Judgment Standards

The general guidelines for analyzing summary judgment motions were reviewed by the Tenth Circuit in *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir.1993):

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L.Ed.2d 202, 106 S.Ct. [2505, 2509 (1986); *Russillo v. Scarborough*, 935 F.2d 1167, 1170] (10th Cir.1991). The moving party bears the initial burden of showing that there is an absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L.Ed.2d 265, 106 S.Ct. 2548 [, 2552] (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). If the moving party meets this burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L.Ed.2d 538, 106 S.Ct. 1348 [, 1355-56] (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991). To sustain this burden, the non-moving party cannot rest on the mere allegations in the pleadings. Fed.R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324[, 106 S.Ct. at 2553]; *Applied Genetics Int'l v. First Affiliated Sec.*, Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

Uncontroverted Facts

The following facts appear uncontroverted. During the relevant times in this case, plaintiff was not an employee of Wabaunsee County, Kansas. Plaintiff operated a trash hauling business. He had a contract with Wabaunsee County, although the contract did not involve plaintiff hauling trash for Wabaunsee County. The contract originated on April 7, 1981 and was redone on February 11, 1985. Under the 1985 contract, a trash hauling rate was established. Plaintiff agreed to haul trash at the established rate for six cities in Wabaunsee County (Alma, Alta Vista, Eskridge, Harveyville, Paxico and McFarland) provided that those cities approved and endorsed the contract. The cities were not required to endorse the contract. If a city did endorse the contract, then plaintiff alone had the franchise to haul trash for that city at the rate established in the contract. Plaintiff was not paid by Wabaunsee County for hauling trash for the cities in the county. Plaintiff was paid by the cities on a per residence basis. One city in Wabaunsee County, Maple Hill, was never part of the contract.

The contract provided that it would renew automatically for successive one-year terms unless either party notified the other in writing of the intent to terminate at least sixty days prior to the end of the contract's annual term. After the Wabaunsee County Commission terminated the contract in 1991, the city of Alta Vista contracted with a different trash hauling company after seeking competitive bids. Plaintiff retained the trash hauling business of the other cities for which he had hauled trash before the contract was terminated.

In 1990, when defendants Spencer, Heiser and McClure were members of the Wabaunsee County Commission, a vote was taken to terminate the contract with plaintiff. Spencer and Heiser voted in favor of termination; McClure voted against. However, notice of the termination was not made to plaintiff in a timely fashion. So, the contract continued through 1990. Defendant McClure's term as a county commissioner expired on January 14, 1991. On January 28, 1991, another vote was taken to terminate the contract with plaintiff. Defendants Spencer and Heiser voted in favor of termination; defendant McClure's replacement on the commission, a Mr. Anderson, voted against termination. This time plaintiff was given timely notice of the intent to terminate the contract.

Throughout the 1980s and in 1990, plaintiff spoke out on many issues. These issues included: landfill user rates; the cost of obtaining copies of county documents from the county; alleged violations of the Kansas Open Meeting Act; and practices of the county road and bridge department. Plaintiff made oral comments before the county commission and also wrote letters or columns which appeared in some newspapers published in the county.

Arguments for Summary Judgment

Defendants' motion for summary judgment raises many arguments, not all of which will be decided in this order. The court will not attempt to decide upon summary judgment many of the factors relevant to an analysis, under *Pickering v. Board of Education*, 391 U.S. 563, 88

S.Ct. 1731, 20 L.Ed.2d 811 (1968) or *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), of whether expression by a government employee is protected by the First Amendment. In other words, the court will assume solely for the purposes of this order that if plaintiff had been a government employee, he would have been protected from termination in retaliation for his statements. The court will also assume for the purposes of this order that plaintiff's comments did motivate the votes in favor of terminating plaintiff's contract with Wabaunsee County. Further, the court shall assume that the termination of the contract caused damages to plaintiff. Finally, the court shall not grant summary judgment on the grounds of legislative immunity, although this appears somewhat of a close question which the court would examine closely if this case were tried. Nevertheless, the court shall grant summary judgment to defendants for the following reasons.

First Amendment

We hold that the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term. There may be a split of authority in this area. But, the court will side with the majority of courts which do not extend to independent contractors the same First Amendment protections granted to government employees.

The Seventh Circuit has held in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir.1983) *cert. denied*, 464 U.S. 1044, 104 S.Ct. 712, 79 L.Ed.2d 175 (1984) and *Triad Assoc., Inc. v.*

Chicago Housing Authority, 892 F.2d 583 (7th Cir.1989) cert. denied, 498 U.S. 845, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990) that the First Amendment does not forbid a government agency from using political criteria in awarding contracts to independent contractors. The appellate court distinguished political patronage cases like *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) on the grounds that independent contractors are less dependent on government jobs than are public employees. It was also noted that independent contractors can work both sides of the political fence and that a contrary rule would invite a First Amendment lawsuit from every disappointed bidder for a government contract.

The Seventh Circuit reiterated its position in *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.) *cert. denied*, ___ U.S. ___, 112 S.Ct. 640, 116 L.Ed.2d 657 (1991). In this case, the governmental defendant refused to renew a lease with the plaintiff parking facility operator, allegedly because of the plaintiff's lobbying efforts against a proposed change in state law which would have permitted the defendant to retain companies to manage parking lots without leasing them. The plaintiff tried to distinguish previous Seventh Circuit cases on the grounds that this was not a bidding situation (instead, plaintiff had a lease which was not renewed), and also because plaintiff was claiming retaliation against free speech rights, not political affiliation. The Seventh Circuit denied the force of both distinctions. The court also held that the extension of *Elrod* and *Branti* in *Rutan v. Republican Party of Illinois*, 497 U.S. 1050, 111 S.Ct. 13, 111

L.Ed.2d 828 (1990) made no difference in the case. In conclusion, the court held that "plaintiff's First Amendment claim must be dismissed because the City was not prohibited from allowing politics to influence its decision not to award a contract to plaintiff." 938 F.2d at 710.

Other circuit courts have made similar rulings. In *Horn v. Kean*, 796 F.2d 668 (3rd Cir.1986), the court held that New Jersey motor vehicle agents were independent contractors who could be replaced on the basis of their political affiliation. In *Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982), the court held that a city's mayor could deny a public contract to an accounting firm which had previously had the contract, because of the firm's political affiliation. See also, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.) *cert. denied*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982). This line of authority has also been followed in: *Blankman v. County of Nassau*, 819 F.Supp. 198, 205 (E.D.N.Y.1993) (developer alleged denial of development opportunity because of opposition to county policies); *Nu-Life Construction Corp. v. Board of Education*, 809 F.Supp. 171, 182 (E.D.N.Y.1992) (contractor cannot claim First Amendment violation for allegedly retaliatory initiation of a board of review proceeding against the contractor); *Medcare HMO v. Bradley*, 788 F.Supp. 1460, 1464-1466 (N.D.Ill.1992) (no cause of action for cancellation of contract allegedly in retaliation for lobbying activities).

Plaintiff has cited three cases to counter this line of authority. Two of the cases, *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir.1983) and *Sisk v. Texas Parks & Wildlife Dept.*, 644 F.2d 1056 (5th Cir.1981), involve the

alleged denial of a liquor license and a commercial fishing license in a manner which discriminates against protected expression. We believe these cases can be distinguished from the case at bar. Like government employees, a bar owner seeking a liquor license and a commercial fisherman seeking a fishing license are much more dependent upon the government for their livelihood than plaintiff was dependent upon the contract with Wabaunsee County for his livelihood. The final decision as to whether plaintiff supplied trash service for a city rested with the city, not Wabaunsee County. The decision to terminate the contract between Wabaunsee County and plaintiff did not prevent plaintiff from contracting with the cities individually to provide trash service.

The third case cited by plaintiff is *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330 (5th Cir.1986). There, the court held a cause of action was stated by a newspaper publisher that claimed defendants retaliated against the newspaper's critical stories by giving defendants' legal advertisement business to another publisher and by threatening other commercial advertisers. The instant case may be distinguished on its facts since the cities of Wabaunsee County, not the County itself, decided whether plaintiff received their business. Thus, while we assume that the termination of the contract was a contributing cause to a loss of business, it was not an independent cause. In contrast, the defendants in the North Mississippi Communications case allegedly exercised sole discretion over the legal advertisement business of the plaintiff.

In conclusion, we are persuaded by the majority of the above-cited cases that plaintiff, as an independent

contractor, cannot claim that his First Amendment rights were violated by the alleged retaliatory termination of his contract with Wabaunsee County, especially when that contract was neither a necessary condition for plaintiff to do business nor a guarantee that plaintiff would receive trash hauling business from the cities of Wabaunsee County.

Qualified Immunity

Under the doctrine of qualified immunity, summary judgment must be granted against any damages claim plaintiff has against defendants for actions taken in their capacities as government officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) holds that government officials cannot be made liable for civil damages under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." We do not believe it was clearly established in 1991 that the First Amendment prohibited defendants from acting to terminate plaintiff's contract with Wabaunsee County because of his public comments. Therefore, defendants are entitled to qualified immunity from damages for any actions taken by them as public officials. See *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir.1989) *modified on other grounds on rehearing*, 924 F.2d 627, *cert. denied*, ___ U.S. ___, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991) (qualified immunity granted against First Amendment claim of bidder on contract to operate a golf course at a state park).

McClure

Finally, we believe there is an independent reason to grant summary judgment to defendant McClure, since he was not on the Wabaunsee County Commission when the contract with plaintiff was terminated. We believe there is insufficient evidence which proves that defendant McClure caused the termination of the contract. See *Papapetropoulous v. Milwaukee Transport Services, Inc.*, 795 F.2d 591, 595 (7th Cir.1986) (an individual cannot be liable under § 1983 unless he caused or participated in the alleged constitutional deprivation).

In reaching this conclusion, we shall assume that defendant McClure did not agree with plaintiff's public comments. We shall further assume that defendant McClure had expressed animosity toward plaintiff and supported the termination of the contract with plaintiff during and after his term as county commissioner. Still, defendant McClure did not vote for the termination of the contract as a member of the Wabaunsee County Commission and was not on the Commission when the vote was taken which actually terminated the contract. The vote to terminate the contract is the alleged constitutional violation in this case. Defendant McClure did not participate in it. Nor is there evidence that defendant McClure committed any act to interfere with the independent judgment of the other commissioners so that his action became a probable cause of the vote to terminate the contract. We do not believe advocacy in favor of the vote provides a sufficient basis for liability. Otherwise, a cause of action might exist against anyone who used rhetoric to promote or encourage an alleged constitutional violation

by a state actor. Obviously, this could chill the same First Amendment rights which plaintiff seeks to enforce.

In conclusion, because the record does not support a reasonable basis to believe defendant McClure caused or participated in the alleged retaliatory act in this case, an independent reason exists to grant defendant McClure summary judgment.

Conclusion

For the above-stated reasons, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Dated this 30th day of December, 1993 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

Keen A. UMBEHR, Plaintiff-Appellant,

v.

Joe McCLURE, Glen Heiser, and George Spencer, Defendants-Appellees.

No. 94-3022.

United States Court of Appeals, Tenth Circuit.

Jan. 4, 1995.

Rehearing Denied Feb. 10, 1995.

Before ANDERSON and TACHA, Circuit Judges, and CAMPOS,* District Judge.

STEPHEN H. ANDERSON, Circuit Judge.

Plaintiff and appellant Keen A. Umbehr appeals the district court's grant of summary judgment to Defendants, members or ex-members of the Wabaunsee County Commission, on his 42 U.S.C. § 1983 action alleging that Defendants terminated a trash hauling contract in retaliation for Mr. Umbehr's exercise of his right to free speech. For the following reasons, we REVERSE and REMAND.

BACKGROUND

Mr. Umbehr operated a trash hauling business in Wabaunsee County, Kansas. By statute, the county was obligated to provide a plan for solid waste disposal. In 1981, the county entered into a contract with Mr. Umbehr.

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* The Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

The contract was renegotiated in 1985. The 1985 contract is the one at issue in this case. Under the contract, Mr. Umbehr did not in fact haul trash for the county. Rather, the contract provided that Mr. Umbehr could haul trash for cities in the county, at a rate specified in the contract, provided each city endorsed and ratified the contract. No city was under any obligation to ratify the contract. Each city had the right to opt out of the contract on ninety days' notice. The contract itself was automatically renewed for successive one-year terms, unless either party gave sixty days' notice of termination or ninety days' notice of intent to renegotiate. The contract further provided that, during its term, the county and each city which approved the contract agreed not to contract with "any other individual or firm to provide solid waste removal from residential premises in any [c]ity." Appellees' App. at 139.

Mr. Umbehr hauled trash for six of the seven cities in the county from 1985 until the county terminated the contract in 1991. In other words, the contract was automatically renewed each year, according to its terms. Throughout this time period, Mr. Umbehr spoke out at county commission meetings and wrote letters and columns in local newspapers about a variety of topics, including landfill user rates, the cost of obtaining county documents from the county, alleged violations by the county commission of the Kansas Open Meetings Act, and a number of alleged improprieties, including mismanagement of taxpayer money, by the county road and bridge department.

Defendants Joe McClure, Glen Heiser, and George Spencer were all members of the Wabaunsee County

Commission in 1990, when the commission voted to terminate the contract with Mr. Umbehr. Mr. Spencer and Mr. Heiser voted for termination, whereas Mr. McClure voted against termination. In fact, the attempted termination was not valid, and the contract continued for another year, until it was validly terminated in January 1991. At the time the contract was terminated, Mr. McClure was no longer on the county commission. His replacement on the commission voted not to terminate the contract, whereas Mr. Spencer and Mr. Heiser again voted in favor of termination. Mr. Umbehr subsequently entered into separate contracts to haul trash with five of the six cities he had previously served. The county did not enter into any other contracts involving trash hauling.

Mr. Umbehr brought suit against Defendants, claiming that they caused the termination of his contract with the county in retaliation for his outspoken criticism of the county and the county commission, thereby violating his First Amendment right of free speech. He sued Defendants Heiser and Spencer in both their official and individual capacities. He sued Defendant McClure only in his individual capacity. Defendants filed motions for summary judgment. The district court assumed, solely for the purpose of its decision, that Mr. Umbehr "would have been protected from termination in retaliation for his statements" had he been a government employee, that his "comments did motivate the votes in favor of terminating [Mr. Umbehr's] contract with Wabaunsee County," and that he suffered damages as a result of the termination. *Umbehr v. McClure*, 840 F.Supp. 837, 839 (D.Kan.1993). It then granted Defendants' motion for summary judgment

on the ground that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." *Id.* The court expressly declined to rule on Defendants' claim that their actions were protected by legislative immunity, but held, alternatively, that Defendants were entitled to qualified immunity from damages for their actions. Finally, the district court held that Mr. McClure was additionally entitled to summary judgment because there was "insufficient evidence which proves that defendant McClure caused the termination of the contract." *Id.* at 841.

DISCUSSION

Summary judgment is appropriately granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "We review a district court's summary judgment determination de novo, viewing the record in the light most favorable to the nonmoving party." *Artes-Roy v. City of Aspen*, 31 F.3d 958, 961 (10th Cir.1994).

[1] Although neither party has raised this issue, we first determine whether Mr. Umbehr has standing to bring this case. Standing is a threshold issue, "jurisdictional in nature." *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir.1993). "For standing to exist, the plaintiff must 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82

L.Ed.2d 556 (1984)). The alleged injury "must be 'distinct and palpable,' *Warth v. Seldin*, 422 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), as opposed to abstract, conjectural, or merely hypothetical." *Id.* (parallel citations omitted).

[2] We conclude that Mr. Umbehr has standing. Mr. Umbehr asserts a violation of his First Amendment rights – punishment, in the form of termination of a contract beneficial to him, because of his speech. While Defendants assert that the contract provided no benefit to the county, from which one could infer that its termination could inflict no injury on the county, Mr. Umbehr has alleged a benefit to him from the contract.[1] The contract obviated the need for him to individually negotiate a trash hauling contract with each city; it gave him the exclusive right to haul trash for cities that ratified the agreement; and it gave him, for at least sixty days, the

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[1] Mr. Umbehr does not claim, nor need he, that he has a property interest in his contract. "[T]he Supreme Court has held a property right is not required for a first amendment retaliation claim." *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1233 (10th Cir.1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)). In *Perry*, the Court made the following widely quoted statement:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.

Perry, 408 U.S. at 597, 92 S.Ct. at 2697.

right to haul trash for cities pursuant to the agreement, inasmuch as the county could only terminate the contract on sixty days' notice.[2] *Cf. Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 476 (9th Cir.1991) (holding that private contract providing for immediate termination for cause or at will termination on ninety days' notice "gave rise to a 'legitimate claim of entitlement' to ninety days of continued employment"). Further, he claims monetary injury from the termination of the contract, and there is no dispute that any such injury is " 'fairly traceable' " to Defendants' actions in terminating the contract. *Doyle*, 998 F.2d at 1566 (quoting *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324). He has clearly alleged an injury caused by Defendants. Accordingly, Mr. Umbehr has standing. We turn now to the merits of his claim that his First Amendment rights have been violated.

Mr. Umbehr was indisputably an independent contractor. As the district court acknowledged, there is conflicting case law on whether those who independently contract with the government share the same degree of First Amendment protection for their speech as government employees.[3] A number of courts have held that

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[2] Cities bound by the contract could only opt out on ninety days' notice.

[3] A public employee speaking on a matter of "public concern" is protected from an adverse employment decision if "the interests of the [employee], as a citizen, in commenting upon matters of public concern [outweigh] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968), and if the employee proves that the protected speech was a "motivating factor" in the adverse employment decision. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *see also Bisbee v. Bey*, 39 F.3d 1096, 1100 (10th Cir.1994).

Speech on matters of public concern has been defined generally as speech "relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). For example, speech disclosing governmental wrongdoing or misconduct is generally of public concern.

See, e.g., Walter v. Morton, 33 F.3d 1240, 1243 (10th Cir.1994); *Wulf v. City of Wichita*, 883 F.2d 842, 857 (10th Cir.1989).

governments may award or terminate public contracts on the basis of political affiliation or support. See *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir.1989) (holding that independent contractor claiming loss of and denial of contracts because of political affiliation was not protected by First Amendment), *cert. denied*, 498 U.S. 845, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir.1983) (holding that independent contractor claiming denial of public contract because of political affiliation was not protected by First Amendment), *cert. denied*, 464 U.S. 1044, 104 S.Ct. 712, 79 L.Ed.2d 175 (1984); *Horn v. Kean*, 796 F.2d 668 (3d Cir.1986) (en banc) (holding that independent contractors whose contracts were terminated following a change in administration were not protected by the First Amendment); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.) (holding that fee agents who were not employees but were " 'more in the nature of independent contractors' " who were dismissed following a change in administration were not protected by the First Amendment), *cert. denied*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982); *Ambrose*

v. Knotts, 865 F.Supp. 342, 345 (S.D.W.Va. Oct. 17, 1994) (holding that independent contractor claiming termination of contract in retaliation for petition was not protected by First Amendment); *O'Hare Truck Serv., Inc. v. City of Northlake*, 843 F.Supp. 1231, 1234 (N.D.Ill.1994) (holding that independent contractor claiming removal from city towing rotation list because of political affiliation was not protected by First Amendment); *Inner City Leasing and Trucking Co. v. City of Gary*, 759 F.Supp. 461, 464 (N.D.Ind.1990) (holding that independent contractor claiming termination of contract because of political affiliation not protected by First Amendment); *MEDCARE HMO v. Bradley*, 788 F.Supp. 1460, 1464-66 (N.D.Ill.1992) (holding that independent contractor claiming termination of contract because of lobbying and other political activities not protected by First Amendment); *see also Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir.), *vacated*, 882 F.2d 207 (6th Cir.1989), reinstated in pertinent part, 924 F.2d 627 (6th Cir.1991) (en banc) (holding that it was not clearly established that independent contractor claiming denial of public contract because of political affiliation was protected under First Amendment), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Fd.2d 1054 (1991). But *see Horn*, 796 F.2d at 680-85 (Gibbons, Sloviter, Mansmannt, Stapleton, JJ., dissenting) (rejecting view that independent contractors can be treated differently than employees for First Amendment purposes).

Our own circuit has suggested, without analysis, that independent contractors do enjoy protection against retaliation for the exercise of First Amendment rights. *Abercrombie*, 896 F.2d at 1233. In *Abercrombie*, the Plaintiff

was the owner of a wrecker business who received referrals from the City of Catoosa police chief. The Plaintiff had received all wrecker referrals from the police for a period of time, but after testifying in court as a witness in a suit against the city, he no longer received all wrecker referrals; instead he shared them with another wrecker company. After campaigning on behalf of a mayoral candidate running against the incumbent mayor, the Plaintiff was removed entirely from the police department's wrecker rotation log. He brought a section 1983 action against the city, the police chief, and the mayor, claiming, inter alia, that he had been deprived of a property interest without due process and that Defendants had retaliated against him for the exercise of his First Amendment rights.

After concluding that the Plaintiff had a property interest in wrecker referrals pursuant to applicable state statutes, we also concluded that the district court erred in granting judgment notwithstanding the verdict on his First Amendment retaliation claim. We gave little reasoning, however, simply stating:

> The district court dismissed the entire Section 1983 claim because it found that plaintiff did not have a property right in continued wrecker referrals. But, as noted above, plaintiff did have a property right in equal referrals. Furthermore, the Supreme Court has held a property right is not required for a first amendment retaliation claim.

Id. at 1233 (citing *Perry*, 408 U.S. 593, 92 S.Ct. 2694). Thus, we simply assumed that an independent contractor could assert a First Amendment retaliation claim.

Other circuits have provided a more detailed analysis of the issue, in reaching the opposite conclusion. The Seventh Circuit in *LaFalce* and the Third Circuit in *Horn* provided the clearest explanation of the reasoning behind those decisions holding that independent contractors enjoy no First Amendment protection when their contracts are terminated or they do not receive government contracts because of their exercise of First Amendment rights.[4] Two broad rationales animated those decisions: (1) the history and legal treatment of patronage practices in government employment; and (2) perceived distinctions between the economic status and interests of independent contractors and employees. We examine each in turn.

As the Horn majority observed, the practice of political patronage is a "centuries' old" and "historically established and traditionally accepted characteristic[ ] of government, be it on a municipal, county, state, or federal level." *Horn*, 796 F.2d at 672, 673; *see also LaFalce*, 712 F.2d at 294 ("Patronage in one form or another has long been a vital force in American politics."). At the time *Horn* and *LaFalce* were decided, only two Supreme Court cases had addressed the propriety of that long-established practice. In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), a divided Supreme Court held that a government employer could not discharge a nonpolicymaking, nonconfidential employee solely because of the employee's political beliefs or affiliation. *Id.* at 375, 96 S.Ct. at 2690 (Stewart, J., concurring). A clear majority in

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[4] Virtually all of the other cases cited above specifically followed the *Horn* and *LaFalce* decisions.

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), reaffirmed that principle, but specifically stated that both *Elrod* and *Branti* dealt only with "the dismissal of public employees for partisan reasons." *Branti*, 445 U.S. at 513 n. 7, 100 S.Ct. at 1292 n. 7. The Court noted that among the many practices falling within the broad definition of a patronage system was "granting supporters lucrative government contracts" but stated that neither Elrod nor Branti involved such practices.

Thus, as the *Horn* majority stated, "We perceive neither authority nor inkling in these decisions to extend first amendment protection beyond stated circumscriptions." *Horn*, 796 F.2d at 674; *see also LaFalce*, 712 F.2d at 294-95 ("We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*."). As indicated, the *Horn* and *LaFalce* courts also relied upon presumed practical and economic differences between independent contractors and employees as a basis for finding no violation of contractors' First Amendment rights:

> [M]ost government contractors also have private customers. If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent and the state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job. Of course, the contrast can be overstated; unless the government worker who loses his job cannot find another job

> anywhere, the loss will not be a total catastrophe. . . . An independent contractor would tend we imagine to feel a somewhat lesser sense of dependency.

LaFalce, 712 F.2d at 294.[5] The Seventh Circuit further observed that "[m]any firms that have extensive government business are political hermaphrodites," and that extending *Elrod* and *Branti* First Amendment protection to independent contractors "would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.*; *see also Horn*, 796 F.2d at 675.

Thus, of the two broad rationales behind *Horn* and *LaFalce* – that the Supreme Court has restricted patronage practices sparingly and only in connection with employees, and that independent contractors have a different economic status vis-a-vis the government than do employees – the first one arguably supports the decisions permitting the award or termination of public contracts on the basis of political affiliation. The question remains whether it supports the termination of government contracts in retaliation for speech on matters of public concern, particularly in light of the Supreme Court's most

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[5] Horn involved independent contractors (motor vehicle agents) most of whom in fact were minimally dependent on their contractual arrangements with the government. The court was therefore able to avoid what it called "the emotionally-charged scenario posed at oral argument: Whether the first amendment would protect from politically-motivated discharge an independent contractor with substantial economic dependence on the state, e.g., a one-person shoeshine stand in a public building." *Horn*, 796 F.2d at 675 n. 9.

recent case involving patronage practices, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

In *Rutan*, the Court extended *Elrod* and *Branti* to hold that "promotions, transfers, and recalls after layoffs based on political affiliation or support" impermissibly infringe the First Amendment rights of public employees. *Rutan*, 497 U.S. at 75, 110 S.Ct. at 2737. The *Rutan* Court's reasoning undermines part of the Seventh and Third Circuits' rationales in their independent contractor cases. The Court dismissed the argument that expanding the protections of *Elrod* and *Branti* would lead to "excessive interference [in state employment] by the Federal Judiciary." *Id.* at 75 n. 8, 110 S.Ct. at 2738 n. 8.

The Court further explained that governmental interests in efficiency and effectiveness can still be preserved by "discharging, demoting, or transferring staff members whose work is deficient" and by permitting the selection or dismissal of "certain high-level employees on the basis of their political views." *Id.* at 74, 110 S.Ct. at 2737. The Court stated the overriding principle as follows: "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Id.* at 76, 110 S.Ct. at 2738. It therefore "precludes the government from accomplishing indirectly" that which it cannot command directly. *Id.* at 77-78, 110 S.Ct. at 2738-39 (citing *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697). Arguably, in permitting governments to terminate a public contract because of the contractor's speech, courts have permitted governments to accomplish indirectly that which they

cannot accomplish directly – punishment of speech that they do not like. Indeed, it is indisputable that in its role as sovereign, the government cannot punish or otherwise burden the speech of citizens criticizing the government, except in very limited circumstances. Under current Supreme Court jurisprudence, the government, in its role as employer, can only punish or burden speech of its employees criticizing the government when it shows that such speech interferes with the government's ability to function. In permitting just that kind of punishment or burdening of speech by independent contractors, courts accord those who contract with the government a lesser degree of First Amendment protection than ordinary citizens enjoy vis-a-vis their government or than government employees enjoy vis-a-vis their employer.

Nonetheless, the Seventh Circuit has adhered to its *LaFalce* and *Triad Associates* precedents, even after *Rutan*. In *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 657 (1991), the court held that a city did not violate the First Amendment when it terminated a lease with an independent contractor who had lobbied against it. The court stated: "We continue to concur in the view taken by the other circuits, and hold that political favoritism in the awarding of public contracts is not actionable." *Id.* at 710. The court held to this view despite acknowledging that, while *Rutan* directly addressed only government employees, its "scope . . . and [the] rationale behind it, seem to be at odds with the holding of *LaFalce* and *Triad*." *Id.* at 709. In our view, *Rutan* has indeed undermined the rationale for *Horn* and *LaFalce* that relied

upon the Supreme Court's reluctance to extend *Elrod* and *Branti*.

The other rationale behind *LaFalce* and *Horn* was premised on differences between public employees and independent contractors. Some of these differences are open to question, while others are undeniably true. Whether or not these are relevant distinctions, for example, independent contractors generally have more discretion and control over the performance of their jobs than do employees, and in that respect some may be more like the high-level policymaking employees who are still subject to patronage dismissals under *Rutan*, *Elrod*, and *Branti*. See *Vickery v. Jones*, 856 F.Supp. 1313, 1325 (S.D.Ill.1994) ("Thus, like high-level employees, independent contractors do not have supervisors and can be hired or dismissed on the basis of political affiliation to ensure that their work is done in accordance with the party's philosophies."). Still others function in a way very similar to employees. *See Smith v. Cleburne County Hosp.*, 870 F.2d 1375, 1381 (8th Cir.) (applying *Pickering* balancing test to denial of medical staff privileges when "there is an association between the independent contractor doctor and the Hospital that have similarities to that of an employer-employee relationship"), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 100 (1989).

On the other hand, much of the *LaFalce* and *Horn* rationale for treating independent contractors differently from employees rests on the assumption that independent contractors have less at stake than an employee, and the loss of a contract is less devastating than the loss of a job. While that is undeniably true in some cases, as it was in *Horn*, we have seen no empirical data that it is always

or even usually the case. *See Horn*, 796 F.2d at 681 n. 1 (Gibbons, C.J., dissenting) ("There is no empirical evidence that independent contractors, especially those involved in providing personal services, are as a group less dependent on the government for work than are public servants."). And with the increasing "privatization" of government, more and more of the government's work is accomplished through independent contractors, thereby increasing both the number and variety of such contractual arrangements.

We of course recognize that there is a long and vital tradition of treating independent contractors differently from employees in many legal contexts. In this First Amendment context, we reject any categorical distinctions based on whether independent contractors have more or less of an economic interest in their governmental contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant. There is little justification for a rule that the magnitude of the loss determines whether an individual's First Amendment rights have been violated. As the dissenting opinion in *Horn* pointed out, "The constitutional wrong condemned in *Elrod* and *Branti* was the state's attempt to control the beliefs and associations of its citizens. That control can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent." *Id.* at 683 (Gibbons, C.J., dissenting) (citations omitted). And *Rutan*'s extension of protection against patronage practices to a variety of employment practices short of dismissal undermines the

argument that only the complete loss of one's job merits First Amendment protection.

[3-5] In sum, of the two rationales behind decisions such as *LaFalce* and *Horn*, which deny independent contractors the First Amendment protections enjoyed by public employees, the first rationale – the Supreme Court's cautious restriction of patronage practices in government employment – has been undermined by *Rutan* and has limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern. The second rationale – presumed differences between the status of independent contractors and employees – is of questionable empirical validity and of dubious relevance to the question of whether First Amendment rights have been violated. Neither one explains why independent contractors should be given less First Amendment protection than either ordinary citizens or government employees. We therefore specifically hold, as we assumed in *Abercrombie*, that an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be. Thus, the *Pickering* balancing test would apply to such a retaliatory action.[6] We realize that this decision places us squarely in conflict with several other circuits, a posture we do not adopt lightly. We also agree with the Seventh and Third Circuits that this is an area in which Supreme Court guidance is particularly needed.

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[6] We recognize that, in Mr. Umbehr's case, damages may be small and difficult to prove.

[6] The district court also held Defendants qualifiedly immune under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." We agree that Defendants should be qualifiedly immune from Mr. Umbehr's claim for damages against them in their individual capacities, given the uncertainty in this area of law. We also affirm the district court's conclusion that there is insufficient evidence proving that Defendant McClure, who was no longer on the county commission when Mr. Umbehr's contract was not renewed, and who in any event had voted earlier not to terminate the contract, caused Mr. Umbehr's injury. We therefore agree that summary judgment was properly granted to him.

[7] Furthermore, Defendants have raised the issue of absolute legislative immunity, which the district court observed was a "close question." Mr. Umbehr sued Defendants Heiser and Spencer in both their official and individual capacities. In their individual capacities, we have held that they are entitled to qualified immunity. An official capacity suit is just "another way of pleading an action against an entity of which an officer is not an agent." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2036 n. 55, 56 L.Ed.2d 611 (1978). As the Supreme Court has stated, "[t]he only immunities that can be claimed in an official capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985).

Accordingly, we REVERSE and REMAND this case for further proceedings consistent herewith. All pending motions are DENIED.

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(9)

No. 94-1654

In The

Supreme Court of the United States

October Term, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. The remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny should not be extended and amplified to protect the economic rights of government contractors whose services are terminable at will.

2. The tests of *Pickering* and its progeny must be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended.

3. If independent contractors are to be given the same protections as employees under *Pickering*, at least the affirmative defenses now available to employers must remain available to the contracting agency.

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

GLEN HEISER and GEORGE SPENCER, in their official capacities as members of the Board of County Commissioners of Wabaunsee County, Kansas.

Respondent:

KEEN A. UMBEHR.

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OPINIONS BELOW

The decision of the U.S. District Court for the District of Kansas granting summary judgment to petitioners is reported as *Umbehr v. McClure, et al.*, 840 F.Supp. 837 (D.Kan. 1993). The decision of the Tenth Circuit Court of Appeals, reversing the grant of summary judgment to petitioners in part and remanding the case for further proceedings against petitioners in their official capacities is published as *Umbehr v. McClure, et al.*, 44 F.3d 876 (10th Cir. 1995). Parallel proceedings in state court between the same parties have resulted in two published decisions: see *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

STATEMENT OF JURISDICTION

Original jurisdiction in the U.S. District Court for the District of Kansas was based upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. Respondent prosecuted a timely appeal to the Tenth Circuit Court of Appeals under the authority of 28 U.S.C. § 1291. This Court has jurisdiction to review the decision of the Tenth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

The judgment of the Tenth Circuit Court of Appeals was entered on January 4, 1995. A petition for rehearing was denied on February 10, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 1:

FREEDOM OF RELIGION, SPEECH AND PRESS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Amendment 10:

RESERVATION OF POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

The named petitioners are two members of the three-person Board of County Commissioners of Wabaunsee County, Kansas, a sparsely populated county in east central Kansas. Petitioners are nominal parties, defending only in their official capacities as representatives of the people of the county. Although claims were made against them as individuals, they were granted summary judgment on the basis of qualified immunity. All claims against Petitioners as individuals were resolved by this Court's refusal to grant the Cross-Petition for Certiorari on the qualified immunity issue. (Joint Appendix p.38).

Respondent Keen Umbehr operated the municipal trash collection service for residents of six towns in the county under a contract negotiated through the Board of County Commissioners. Although no county refuse was collected under the contract, the county was a party to the agreement because its landfill was the expected ultimate resting place for the trash. (Joint Appendix p.22).

Under the contract those towns which elected to participate would pay fees to Mr. Umbehr, and Mr. Umbehr would pay landfill charges for using the county dump. Each town agreed not to do business with any competing trash hauler. The contract was renewable annually, with an option for any party to terminate with 60 days' prior notice. (Joint Appendix p.22). The contract gave Mr. Umbehr the right but not the duty to dispose of the collected refuse at the landfill owned by the county, in return for his agreement to pay landfill charges under a schedule fixed by the county. The contract provided for termination for cause and included as cause the nonpayment of fees for depositing refuse at the county landfill. (Deposition Exhibit 3, pp. 138-152 of Supplemental Appendix to 10th Cir. Brief of Appellee).

In early 1989 the Wabaunsee County Commission began discussing the need to raise landfill rates. The possibility of a rate hike was raised due to the feared impact of new environmental protection regulations, which were expected to impose requirements for potentially costly monitoring of pollution levels and more expensive methods of handling waste at the landfill. The expected costs were believed to be so great that the county might be compelled to close the landfill altogether and to send refuse generated in the county to a regional

landfill some distance away. (Deposition Exhibit 27, pp. 167-168 of Supplemental Appendix to 10th Cir. Brief of Appellee).

Mr. Umbehr appeared at County Commission meetings and spoke against a general increase of user fees and any move to close the county landfill, which would have increased his own operating costs. Mr. Umbehr stated that he preferred increased fees to be paid out of other existing funds or through tax increases. (Deposition Exhibits 27, 28, and 31, pp. 167-170A of Supplemental Appendix to 10th Cir. Brief of Appellee). Mr. Umbehr was sufficiently concerned about this and other issues that he declared himself a candidate for an upcoming vacancy on the Board. (Umbehr contested the bid of Commissioner McClure for re-election.) (Deposition Exhibits 25 and 33, pp. 166 and 171 of Supplemental Appendix to 10th Cir. Brief of Appellee).

During the course of his campaign Mr. Umbehr made public comments, both in and out of print, criticizing the individual members of the Board of County Commissioners. As a result of some of his criticisms the official conduct of the members of the Board was investigated by the Kansas Attorney General. On December 29, 1989 the Attorney General reported the result of his investigation, which included an express finding that no member of the Board of County Commissioners had engaged in any misconduct. (Deposition Exhibit 10, pp. 157-159 of Supplemental Appendix to 10th Cir. Brief of Appellee).

In February, 1990 the Board voted 2-1 to terminate Mr. Umbehr's trash collection contract. Commissioner McClure voted against termination. Because notice of

termination was not given properly, the contract renewed automatically for another year. (Joint Appendix p. 13).

In April, 1990 the Board voted to raise the rates for all landfill users, including Umbehr, effective June 1. (Deposition Exhibit 39, pp. 172-173 of Supplemental Appendix to 10th Cir. Brief of Appellee). Mr. Umbehr refused to pay the increased rates and filed both an appeal and a civil action in the District Court of Wabaunsee County, Kansas seeking an injunction against the rate hike. (Deposition Exh. 69, pp. 178-181, and pp. 3-87 of Supplemental Appendix to 10th Cir. Brief of Appellee). This litigation was unsuccessful, and ultimately resulted in published decisions on appeal in the Kansas courts. See *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

The Kansas Supreme Court ultimately held in the parallel proceedings that Umbehr had no right to appeal from the decision to raise the landfill rates absent proof of a violation of his constitutional rights or oppressive conduct. Their opinion noted that Mr. Umbehr had never alleged in those proceedings that his constitutional rights were violated by the decision to raise the rates for using the landfill. According to that opinion any decision by the Board which Mr. Umbehr could prove violated his constitutional rights would be set aside in a timely appeal. See 252 Kan. at pp.36-38.

Both Umbehr and McClure failed in their 1990 election bids, losing to a third candidate, Steven Anderson. Mr. Umbehr's public criticisms of the Board members

ceased after the election. (Petition for Writ of Certiorari, p. 9).

The question of terminating the municipal trash hauling contract was again debated in January, 1991. Commissioners Spencer and Heiser voted to terminate, and Commissioner Anderson voted nay. (Joint Appendix p. 13). Mr. Umbehr promptly negotiated exclusive contracts with five of the six participating towns, with higher rates payable to him. Mr. Umbehr made no attempt to appeal the board's decision to terminate the contract as he had done from the rate hike. (Deposition Exhibits 78-82, pp. 182-222 of Supplemental Appendix to 10th Cir. Brief of Appellee).

At the time the vote was taken Mr. Umbehr had been in default in the payment of landfill charges for over six months. (Pp. 51-55 of Supplemental Appendix of Appellee). His default was not stated to be a motivating factor in the votes of the Board members, however. The reason for termination stated at the time was a desire to remove the county from the entanglement of a contract from which it received no benefit. (Depositions of Glen Heiser and George Spencer, pp. 323-373 and 492-516, Supplemental Appendix to 10th Cir. Brief of Appellee).

Throughout the state court appeal Mr. Umbehr had refused to pay the increased fees mandated in the spring of 1990. On July 25, 1991, an order of the District Court of Wabaunsee County prohibited Umbehr from continuing to use the landfill until the delinquent payments were made. In August, 1991, Mr. Umbehr paid the overdue user fees for the period from June, 1990 to May, 1991. (Pp.

51-55 and 85 of Supplemental Appendix to 10th Cir. Brief of Appellee).

The present action was filed in the U.S. District Court for the District of Kansas on May 15, 1991, alleging that the decision to terminate Mr. Umbehr's monopoly trash hauling contract on January 28, 1991 was a violation of his First Amendment rights. Mr. Umbehr sued the three County Commissioners who held office in 1990 when the original decision was made to terminate his contract, even though only two of them had voted for termination. He did not sue Commissioner Anderson. (Joint Appendix p.1).

A summary judgment motion was filed on behalf of all defendants on December 16, 1991. Summary judgment was granted on December 30, 1993. The District Court held that all claims against the defendants in their official capacities were barred because independent contractors are not entitled to the same protection as employees under the First Amendment. The claims against all defendants in their individual capacities were also found to be barred by the application of qualified immunity. The claims against defendant McClure were found to be additionally barred because he had never voted to terminate the contract. The District Court reasoned that the termination at will of a public contract could not, as a matter of law, give rise to a claim for money damages under 42 U.S.C. § 1983, because public contracts are not analogous to employment relationships and because the economic injury claimed by Mr. Umbehr was too remote. (Joint Appendix pp. 1, 3-4, 10-20).

On review the Tenth Circuit Court of Appeals affirmed the decision with respect to all three defendants in their individual capacities, but reversed with respect to the official capacity claims. The Tenth Circuit disagreed with the reasoning of other circuits which had already ruled on the same issue, concluding that independent contractors are entitled to relief for the retaliatory termination of at-will contractual relationships, so long as some potential economic benefit to the contractor, no matter how indirectly occasioned, is lost due to the termination. In so holding the Tenth Circuit opinion expressly noted that its conclusion was "squarely in conflict with several other circuits, a posture we do not adopt lightly." The opinion further noted the view of the panel that the issue is one in which Supreme Court guidance is particularly needed. (Joint Appendix pp. 21-38).

Petitioners' motion for rehearing was denied and a timely Petition for Writ of Certiorari was filed and granted. (Joint Appendix pp. 8-9).

SUMMARY OF ARGUMENT

Pickering v. Board of Education of Township High School District, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny recognize the legitimate right of government agencies to control their own operations for the purpose of assuring effective and efficient service to the public. Part of that right of control must be the power to delegate the task of delivering those services to private persons without losing control altogether. Because independent contractors are not subject to direct control in the

same way as an employee, the right of control must include the power to revoke such a delegation with impunity. Any limitation on the right to terminate the delegation of government responsibilities to an independent contractor is a complete denial of the right of control, rather than a restraint justified by balancing the right of control against First Amendment rights.

The decision to regain control of previously delegated government operations is inherently a policy decision which is legislative in nature, deserving of full legislative immunity. Such policy decisions will inevitably be based on political considerations, and should not be scrutinized by the courts. Allegations of improper motive are legally irrelevant to the assessment of the constitutionality of any exercise of legislative authority. Retaliatory intent should thus not invalidate the policy decision to transfer direct responsibility for services back to the government from an independent contractor.

The decision of any government agency to regain direct control and supervision over government services which have previously been delegated to private contractors is presumptively reasonable and politically debatable, and must therefore be subject to ultimate control by the people as voters. Any attempt by the courts to interfere with the discretion of a unit of government to exercise control over the details of the performance of its own services, in preference to leaving control of those functions in the hands of private persons who do not have the trust of the people or their elected representatives, would usurp the political power guaranteed to the people themselves by the Tenth Amendment.

The actions of government officials in deciding whether to terminate a contractual delegation of government services should be judged on an objective standard. Attacks on their personal motives should not be allowed to control the validity of their votes. Where a reasonable public official could conclude that termination of a contract serves the public interest, psychological motives should be deemed irrelevant as a matter of law. Retaliatory motive should be relevant, if at all, only after the contractor has established that no public interest was served by the termination of the contract. Even then the question of motive should be limited to suits against officials as individuals, and should have no relevance in actions against the government itself.

Independent contractors do not need a money damages remedy for retaliatory termination of their contracts. The public interest requires that the discretion to delegate or not should be exercised without fear of penalty. Where an articulable public benefit from the termination of the contract exists, the interest of the public must outweigh the private financial interest of the contractor as a matter of law. If no legitimate public benefit can be articulated, then the termination should be set aside by the courts. The contractor should not have the privilege to forego reinstatement of the contract and elect to sue for loss of profit.

ARGUMENT

1. The remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny should not be extended and amplified to protect the economic rights of government contractors whose services are terminable at will.

This case squarely confronts the Court with the need to determine the scope of the rights and duties of persons who provide public services through contract arrangements with local government, rather than serving directly as governmental employees. This Court has not previously decided whether the free speech protections afforded to governmental employees will be extended to persons who provide services to the public less directly, as non-employee contractors.

The Court should now decide that the policies underlying its decisions limiting the rights of public employees apply with even greater force where the relationship is one of principal and independent contractor. Because the only means available to exert control over the actions of an independent contractor is to terminate the contract, any restraint on the right of termination would destroy the government's right to control the public services performed under the contract.

The decision of the Tenth Circuit Court of Appeals must not be allowed to stand. The Tenth Circuit Court of Appeals has decided that the federal courts should give legal protection to the profits of those who provide public services as non-employees, no matter how tenuous the

contractual relationship with the government may be and without regard to the unqualified contractual right of the government to terminate the relationship at will. The Tenth Circuit Court of Appeals has imposed on local units of government an obligation to avoid economic injury to government contractors whose statements on issues of public concern may have irritated public administrators, even if the clearly expressed will of the people demands otherwise.

This Court has never construed the Constitution to provide a guarantee of continued profit at public expense to persons who exercise their free speech rights. Neither public employees nor persons who otherwise profit from the performance of public service have been allowed to tie the hands of responsible government officials exercising reasonable control over the delivery of government services. This Court's decisions have always recognized the right of responsible public officials to take the steps necessary to maintain effective control over those who perform the basic work of government. There is no reason to back away from these precedents now.

A Review of Prior Decisions

A substantial body of case law has developed to establish the rights of public employees to express themselves freely on matters of public concern. This Court has recognized the practical necessity of some limitation on the work-related speech of government employees in order to assure the orderly operation of governmental functions. The relative rights and responsibilities of the government employer and government employee have

been articulated in a series of cases spanning more than twenty-five years: See, for example, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). These cases hold that free speech rights of government employees may properly be subjected to limitations which could not permissibly be applied to the general public. Even express prior restraints, and not just *post hoc* sanctions, may sometimes be justified under the *Pickering* balancing test. See *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 546, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) and discussion in *National Treasury Employees* at 130 L.Ed.2d p.980.

One overriding concern in such cases is avoiding the creation of a constitutional right of employee tenure. The Court has afforded wronged employees only those remedies which are necessary to place them in no better and no worse a position than they would have been in had the protected comments never occurred. See *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 2[illegible] 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

This court has struggled with the proper application of the First Amendment to political patronage practices. From *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) to *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) to *United States v.*

National Treasury Employees Union, supra, there has been dissension among the members of the court concerning the extent to which the First Amendment should be hostile to the practice of providing special employment favors to the political supporters of those in power. Most recently in *U.S. v. National Treasury Employees Union, supra.*, it was suggested that the conflict might be resolved by the application of different standards of scrutiny to cases involving political patronage, especially those involving potential prior restraint, versus disciplinary actions taken against individual employees based on after the fact determinations. See discussion at 130 L.Ed.2d p.979 *et seq.*, compared with the comments of Justice O'Connor in her opinion concurring in part and dissenting in part at 130 L.Ed.2d pp. 988 *et seq.*

The members of this court have not been in full agreement concerning the test to be applied when a government employer expressly regulates the content of its employees' speech. Some members of the Court have strongly suggested that the historical standard applied in such cases is more lenient than the constitutional standard applicable to restraints on the speech of members of the general public. See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), dissenting opinion of Justice Scalia at 497 U.S. pp. 98-102 (joined by the Chief Justice and Justices Kennedy and O'Connor). It was there noted that this court's decisions consistently follow the standard laid down in *Public Workers v. Mitchell*, 330 U.S. 75, 97 S.Ct. 556, 91 L.Ed. 754 (1947), requiring only a reasonable conclusion that the regulation would enhance the efficiency of the government's provision of services. The majority opinion in *Rutan* concluded

that blatant political patronage did not meet the constitutional test, whether it is phrased in these terms or in stronger language.

Whatever the resolution of the ongoing dispute concerning the standard for review of patronage practices may be, that dispute need not in any way affect the court's decision in this case. Cases which involve neither prior restraint nor political patronage should be governed by the more lenient standard of review originally stated in *Pickering*. There has never been any suggestion that Mr. Umbehr's contract was terminated so that he could be replaced with a political ally. His contract remained in place for many years despite his lack of political affiliation with petitioners or their supporters. The purported retaliation occurred after he made his public comments, without prior restraint. The dispute between the majority and the dissenters in *Rutan* therefore should not be a source of division here.

In the cases discussed in the dissenting opinion in *Rutan, supra,* the balancing to be performed by the court is not to weigh the personal interests of the worker against the alleged improper motives of his superiors. Instead the test balances the interest of the public in assuring discourse on a matter of public concern against the public's competing interest in seeing that the services entrusted to the employing agency are performed effectively and efficiently. It was expressly noted, for example, in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) that not all of the employee's First Amendment rights are relevant, but that only discourse on matters of public concern should be considered. *Connick* concluded that employee communications which

relate solely to personal concerns or workplace conditions cannot provide a basis for objecting to sanctions imposed by the employer, even though the comments would be protected by the First Amendment if they were made outside the employer/employee relationship. See 461 U.S. at p. 147. If the comments relate to the desires of the employee for different working conditions than the employer wishes to provide, discipline may be imposed without any need for constitutional justification. See 461 U.S. at pp. 148-149.

Even if the test of *Pickering* is not applied to any relationship except that of employer and employee, a similarly relaxed standard of review would apply to decisions which are content neutral and which only incidentally burden speech. A standard only slightly different from the *Pickering* balancing test has traditionally been applied to government actions which happen to result in a restriction of free speech but are not primarily intended to do so. This court repeatedly has held that persons who engage in activities protected by the First Amendment do not thereby become automatically immune to all adverse action by agencies of government. The fact that enforcement of the law will have the incidental effect of inhibiting or even precluding the complaining party's First Amendment activities does not by itself permit the courts to nullify otherwise legitimate exercises of government power. Examples of permissible incidental effects can be found in numerous decisions, including *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986); *Ward v. Rock*

Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *F.T.C. v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); and *Alexander v. United States*, 509 U.S. ___, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)

Independent Contractor vs. Employee

Assuming arguendo that a higher standard applies to broad regulations which imposing express prior restraints on the political speech of civil servants as a whole, application of that standard cannot be justified where complaint is made by an independent contractor to whom the performance of some part of the government's responsibility to its citizens has been delegated.

If independent contractors are allowed to prevent the cancellation of their contracts so long as they publicly criticize the public officials who control the decision to cancel or not, the public services they perform will be placed beyond any regulation or restraint. If criticism of a government decisionmaker prevents public control over government services, the result will not be the elimination of wrongs but the grant of property rights. The independent contractor would have greater rights as a result of his comments, contrary to the rule of *Mt. Healthy, supra*, if objectionable speech could create tenure.

The rule of *Pickering* would be stood on its head if an independent contractor could obtain greater First Amendment protection by seeking to compare himself to

an employee, since employees have less protection than the general public, not more. Because of the special rules limiting control over the operations of independent contractors, their rights should be even more limited than those of employees.

The relationship between an employer and an employee differs significantly from the relationship between a principal and an independent contractor. An employee is hired to render a service without a guarantee of results. In exchange for relief from the burden of guaranteeing a result, the employee gives up control over the day to day operations on the job. Employers maintain day to day control of the details of the manner in which the work is performed by employees.

When the public is dissatisfied with the quality of services performed by employees, they need only make the fact known to the elected representatives who wield authority over those employees. An effective response can be assured without delay. The employee is legally obligated to obey corrective directions from higher up.

Government control of the performance of public services is heavily impaired when the job is delegated to a private contractor. Where a task has been delegated to an independent contractor, the contractor exercises the right to control the details on a daily basis. By delegating public services to an independent contractor the government temporarily loses direct control over the performance of the services and retains only the ultimate right to terminate the relationship.

Although a government agency may entrust part of its operations to an independent contractor, it does not

also delegate the ultimate responsibility for the service. The people remain entitled to look to the government when they are dissatisfied with those services, and to demand changes if the service is inadequate for any reason. But the government cannot issue orders directly to the independent contractor or his employees to change the manner in which the service is performed. Control is exercised only indirectly, by threatening the termination of the contract if the contractor will not voluntarily correct the objectionable practice.

Where the relationship between the parties is one of principal and contractor, there is no flexibility available when it becomes advisable to redistribute the relative powers and responsibilities of the parties. If the principal decides that greater control is required, the contract must be terminated. A new and different contract, perhaps a contract of employment, may thereafter be negotiated between the same parties. But before such a contract can be negotiated, the old relationship that denies a right of control to the principal must be abolished.

In the factual context presented here, the difference between an employee and an independent contractor is highly significant. Because Mr. Umbehr was an independent contractor and not an employee, he was free to decide how many trucks to operate, how many employees to hire, what wages to pay, the schedules to be followed in collecting trash from residential customers, and the means of disposing of the accumulated refuse.

As an independent contractor Mr. Umbehr ran the risk of failing to make a profit if his decisions on these subjects were unwise. Because Mr. Umbehr's contract

gave him discretion over methods and procedures, he was free to increase his personal profit by devising more efficient methods for the performance of the service.

Because his contract did not obligate him to use the county landfill, but merely guaranteed him the privilege to use it if he elected to do so, Mr. Umbehr was free to find a more profitable disposal site elsewhere, if he so desired. Because there was no guarantee that the trash hauled by Mr. Umbehr's trucks would be deposited at the county landfill, the Board had no assurance that revenue from that source could be used to finance its operations. Continuation of the existing contract therefore undermined the county's ability to plan for the future of its citizens' waste disposal needs.

Had Mr. Umbehr been an employee he would merely have had supervisory authority over subordinate staff whose activities were ultimately controlled, even in slight detail, by the Board of County Commissioners. The Board and not Mr. Umbehr would have decided how many trucks to operate, the schedules for trash pickup, and the ultimate destination of the collected refuse. The risk of adopting different means and methods would have fallen on the County, not on Mr. Umbehr. Control of those means and methods would also have remained with the county, however.

As an independent contractor Mr. Umbehr had a potential conflict of interest with the people of the County. If there was any opportunity to increase his profit margin by having the citizens subsidize the cost of using the county landfill, he was motivated to work

toward that end rather than absorb additional costs himself. That conflict became real when the question of increasing user fees became a subject of debate before the County Commission. Mr. Umbehr yielded to the conflict and spoke out in favor of an increase in taxes, rather than an increase in user fees, to pay mounting costs for operating the landfill.

So long as Mr. Umbehr's contract remained in place, Petitioners were not free to make ultimate policy decisions concerning the wisdom of maintaining a county landfill. For example they were not free to close the landfill altogether, since to do so would be a breach of the contractual provision guaranteeing Mr. Umbehr access to the site. Similarly, the Board of County Commissioners was not free to decide that the landfill would accept only certain types of refuse, or only limited volumes.

In order to regain control over the long term planning for the use of the landfill, the Board of Wabaunsee County Commissioners was required to relieve itself of the contractual obligation to continue to operate the landfill in a manner consistent with Mr. Umbehr's chosen operating methods. Only upon termination of the contract could the county again become free to decide how to operate the landfill, and free to decide to close it altogether if public health, safety and welfare required that result.

All of these decisions would have remained under the control of the Board of Wabaunsee County Commissioners if Mr. Umbehr had been employed as a supervisor of a government department entrusted with the same

tasks, rather than operating under an independent contract. They would have retained the right to abolish his position in anticipation of the closing of the county landfill. Had he been an employee he could have been fired for insubordination for the remarks he made in county commission meetings, despite the public interest in the issues at stake, under the balancing test of *Pickering*.

The same considerations that apply to reassertion of control over government services may not apply to retaliatory acts against persons who are not performing services for the public as a surrogate for the government, but are merely regulated by the government along with others doing similar work. Nor do they apply in the same manner where the contract is terminated solely in order to reassign it to a political supporter. Although the legal relationship between a friendly contractor and an unfriendly one is the same, the likelihood that objectionable practices will be corrected in response to polite advice is greatly increased where the contractor is a political ally. Political strife may therefore be indirectly relevant in assessing the need for a reassertion of direct government control. Where political differences prevent the amicable resolution of public complaints about the contractor's services, termination may be the most effective means of assuring proper service to the public.

The discussion in the decision of the Tenth Circuit Court of Appeals in this case, as well as the discussion in the opinions from other Circuits noted by the Tenth Circuit, overlooks the considerations outlined above. Because *Pickering* expressly requires a balancing of the government's need for control against the First Amendment's guarantee of free and open discussion of matters

of public concern, the analysis set forth above is much more relevant than some of the reasoning in the conflicting opinions of the various Circuit Courts of Appeal. The degree of financial dependence of the contractor or the similarity of the dispute to a workplace grievance, for example, simply have no bearing on the weight to be given to the government's right to control the performance of its own services to the public. If this right of control is ignored it is not possible to perform the *Pickering* balancing test rationally. If the right of control is considered it is difficult to imagine a circumstance where the contractor's right to speak would prevail over the government's right to assert control over its own operations.

A *Per Se* Rule for Independent Contractors

The First Amendment cannot reasonably be construed to require the delegation of governmental powers to private citizens who have outspokenly criticized public decision makers merely because the decision to do otherwise would result in economic loss to them. If a legal right to compensation for economic loss resulting from a political decision to change the distribution of authority over local services is granted to all persons who vocally oppose that political decision, the inevitable result will be a wholesale transfer of power from elected representatives and their duly appointed administrators to the courts. This result not only is not compelled by the First Amendment, it is prohibited by the Tenth.

The Tenth Amendment is not a dead letter. It was applied very recently to guarantee the political rights of

the people of the several states to have unfettered control over the identity of their elected representatives. See *U.S. Term Limits, Inc. v. Thornton*,___U.S.___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). In that case the efforts of a state legislature to place limits on the right of constitutionally qualified candidates to run for national office were struck down as an improper interference with the Tenth Amendment guarantee that the people themselves exercise the power to choose their representatives.

It is questionable whether the Board of County Commissioners would have had the authority to agree to an irrevocable delegation of control of refuse disposal operations to Mr. Umbehr. Any attempt to do so would have cut off the people's right to control local government. Certainly the United States Constitution does not give the federal courts control over local trash service. When the people refused to elect Mr. Umbehr to the Board and instead elected representatives who chose to terminate his authority over basic local services they exercised their constitutionally guaranteed rights. Neither Mr. Umbehr nor the courts have any right to divest the people of that right of control, either to keep power in his hands or to deliver it into the hands of a judge or jury.

If the refusal of the people to elect Mr. Umbehr to a position of official authority is not recognized as an exercise of constitutionally protected authority, then the Board's independent decision to cancel the contract should be recognized in its own right. When the board terminated the trash hauling contract it made a policy decision on behalf of the people, if that decision was not yet made clearly enough. Under Kansas law the Board performs all of the county's executive and legislative

functions, and exercises some quasi-judicial authority as well. Under Kansas law counties have sovereign authority within their own borders, subject only to the state constitution and some limited control by the state legislature, under a system known as home rule. See *State ex rel. Stephan v. Board of Sedgwick County Commissioners*, 770 P.2d 455, 244 Kan. 536 (1989) and K.S.A. 19-101 *et seq.* Both the District Court and the Court of Appeals recognized that the application of legislative immunity to the Board's actions was a "close question". See Joint Appendix at pp. 14, 38. The question should not be a close one. The vote to terminate was a clear exercise of discretionary sovereign power, with which the courts should not interfere.

Under the doctrine of legislative immunity no liability attaches for votes on legislative issues, even if the votes are cast with a malicious intent to cause harm. See *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951). Legislative immunity applies to state and local officials acting in a legislative capacity. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979) and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 64 L.Ed.2d 641, 100 S.Ct. 1967 (1980).

The same policy considerations which support absolute immunity for legislative votes should apply to prevent judicial interference with the decision to perform government functions directly, through contractors, or even to forego providing them at all. These decisions go directly to the basic policy choices of big budgets versus small ones, big government versus small government, big bureaucracy versus privatization, which cannot be

decided in the courts. Because decisions of this nature may depend upon unforeseeable practical and political considerations, they must remain reversible if it appears that a mistake has been made or if circumstances change. The political process is far better suited to make these decisions and readjustments than the courts.

2. The tests of *Pickering* and its progeny must be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended.

If the Court does not categorically reject all claims by government contractors, it should adopt the least stringent rule compatible with the right of the people to control the operations of government, rather than transferring control to private interests or the courts. Where no prior restraint is involved and no express attempt to regulate any speech is apparent, the least stringent test of constitutional limitation is obviously appropriate. That test can be applied without inquiry into the personal motives of the public officials responsible for the questioned decision. The courts should not assess the relative interests of the parties on a case by case basis, other than to look for a rational basis which justifies the incidental restraint on free speech.

Whether the same test is applied to all contract cancellations or not, there surely is no need to impose a stricter standard of scrutiny where an independent contractor complains of economic injury than is applied to claims by members of the general public for injuries of the same kind.

The rule applicable to alleged infringement of the rights of the general population requires only that an incidental restraint on freedom of speech be no greater than is reasonably necessary to achieve the public purposes unrelated to regulation of speech which afford a general justification for the government's actions. See *Turner Broadcasting System v. F.C.C.*, 512 U.S. ___, 114 S.Ct. 2445, 129 L.Ed.2d 497, especially the discussion at 129 L.Ed.2d pp. 530-531. A governmental employer is allowed somewhat greater discretion and power in the control of the actions of its own employees than would be allowed under *Turner Broadcasting*, whether the employer expressly seeks to impose a prior restraint or whether disciplinary action is imposed after the fact. Certainly where no content-based prior restraint is involved, neither an employee nor a member of the general public can demand that the needs of the public take a back seat under either test.

Even where blatant political patronage or prior restraint may be alleged, this Court must be extremely cautious in opening the courthouse door to profitseekers whose real purpose is to avoid the legitimate result of public debates and elections. Only political opponents of public officials will have standing to sue for alleged retaliation, if such suits are allowed, because only they will have done anything to invoke First Amendment protection. No matter how beautifully crafted this Court's rule of decision might be, that rule will only be applied when the parties are in court. Small units of government can rarely afford to litigate a case like this far enough to get a favorable decision on the merits. They are strongly motivated to yield to the demands of potential plaintiffs to

avoid expenses. Any rule of law which requires much more than a motion to dismiss on the pleadings to defend against this sort of abuse will fail its essential purpose.

There is no constitutional policy which would justify favoring political enemies over political friends in government contracting. If the Constitution recognizes little or no value in awarding spoils to the electoral victors, it must also recognize even less value in providing court ordered spoils to the losers at the polls. If no public purpose is served by having elected officials appoint their political friends to lower offices, then neither is there any public purpose to be served by requiring them to appoint their political opponents. Complaints by disgruntled losers must be recognized as the self-interested, anti-democratic, profit-motivated ploys that they really are, and not as the public-spirited defense of basic liberties that they pretend to be.

If government contractors are to be given the right to sue for termination of their rights under some circumstance, the triggering event should not be the existence of a retaliatory motive engendered by harsh political debate. To do so would inspire contrived conflicts with political opponents for the sole purpose of generating a factual basis for lawsuits. Such contrived conflicts would provide disgruntled contractors with leverage to coerce favorable decisions from their political opponents to avoid litigation. Such political blackmail must not be encouraged. Whatever rule is adopted, the risk of such blackmail must be avoided by requiring a significantly higher initial burden of pleading and proof than the establishment of personal conflicts between the parties.

Eliminating consideration of alleged retaliatory motive is also favored by separate policy considerations. This Court has decided as a matter of public policy to protect government officials from burdensome and harassing inquiries into their personal thought processes in the context of qualified immunity. The alleged presence of a retaliatory motive cannot defeat a claim of qualified privilege. In *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) this Court recognized that earlier qualified immunity cases had allowed the imposition of liability where the defendant acted with the malicious intention to cause a deprivation of constitutional rights. See discussion at 457 U.S. pp. 815-818, where the so-called "subjective element" was rejected and the test of qualified immunity was reduced to a solely objective standard. *Harlow* also specifically noted that the doctrine of qualified immunity is available in addition to, and not as an alternative to, other recognized doctrines of absolute immunity. See 457 U.S. at p. 818, footnote 30.

The subjective element of the qualified immunity test was removed for the stated reason that it was undermining the intended purpose of the qualified immunity doctrine, the resolution of insubstantial claims at or before summary judgment. The *Harlow* opinion specifically disallowed discovery concerning the intent of the individual defendants until the threshold question of the objective state of the law had been determined. See discussion at 457 U.S. 818. The recognition of a right to sue whenever an alleged retaliatory motive taints an otherwise legitimate decision to terminate a government contract would undermine the goals of the *Harlow* decision.

Adopting any principle of judicial suspicion toward termination of contracts with vocal political opponents would threaten to convert far too many of the daily decisions of local government into lawsuits. The courts do not have the resources to decide petty political disputes over contracts for everything from street cleaning to vending machines to trash disposal, even if the Constitution permitted it. Not only does the Constitution not mandate such micromanagement, it prohibits it. Votes at the polls, not in the jury room, must ultimately decide these mundane affairs. If all of these matters were subject to resolution in the courts, there would be no purpose in having a public debate. Only the judge and jury would decide what to do, so only they would need to be informed of the pros and cons on any issue.

State and local units of government need to have at least as much freedom and discretion to regulate the means employed in providing services to the general public as the courts allow to federal agencies. As the politically motivated process of downsizing and decentralizing government continues, more and more of the important functions of government will be performed at the state or local level. The change of geographical location of the responsibility for performing such services should not increase the degree to which the courts are prepared to intervene in government administrative decisions.

Every government decision to enter into or to terminate a contract with a private service provider is a potential subject for public debate protected under the First Amendment. Every decision whether or not to delegate some part of the responsibilities of government, every

decision to have the government stop performing a particular service altogether, and every decision to spend public funds can lawfully be opposed in public debate. Every decision to reverse a prior decision on these same matters is equally debatable. If the mere fact of opposition, coupled by a decision contrary to the expressed wishes of opponents of the policy ultimately adopted, can transfer to the courts the ultimate decision on matters of public policy, then the First Amendment will have been converted into a mechanism for the dismantling of all units of state and local government and the transfer of their powers to the federal courts. Every political debate will be converted into a court case, unless this Court recognizes that the losers of such debates must simply live with the economic consequences inherent in public policy decisions rather than suing for damages.

The First Amendment does not guarantee the right of any citizen to control political decisions. Neither does the First Amendment guarantee to individuals the right to operate public agencies for their personal profit. Instead the First Amendment contemplates the full and fair public debate of matters of public concern, including the appropriate means for performance of public services, followed by a decision by the peoples' elected representatives determining the correct policy to follow.

It is an inherent part of the process contemplated by the First Amendment that the policy ultimately chosen will have been opposed by a minority. In many instances the opposition will have been motivated in part by an expectation of financial gain or loss to the advocates on

either side of the issue. The existence of a potential financial gain or loss cannot be allowed to convert an ordinary political decision into a constitutional wrong.

In any debate over matters of public concern it is not only expected but appropriate for the decision maker to consider public statements both for and against the policy ultimately adopted. The fact that an opponent's arguments have been considered and rejected cannot be allowed to convert the adverse decision into an unlawful act of retaliation which guarantees financial compensation to the political loser.

3. If independent contractors are to be given the same protections as employees under *Pickering*, at least the affirmative defenses now available to employers must remain available to the contracting agency.

A number of defenses have been recognized to apply to claims of employees for wrongful termination. All of these defenses, without exception, should be available to a government agency accused of wrongfully terminating an independent contractor's rights.

The rule of *Connick v. Myers, supra*, that termination is always permissible in response to expressions of disagreement with workplace policies which do not implicate issues of general public concern, should apply equally to employees and contractors. Mr. Umbehr's comments relating to the use of the county landfill would qualify as personal matters under this test.

Every independent contractor should be subject to lawful termination for cause on the same grounds as an

employee. Failure to perform the agreed services competently obviously should justify termination of a contractor, just as it would justify termination of any employee, including one with contractual tenure. See *Elrod v. Burns, supra.*

This Court has held that money damages are not available to an employee from the date when the employer is aware of facts which would support a lawful termination for cause. See *McKennon v. Nashville Banner Publishing Company*, ___U.S.___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). A similar rule should apply to the termination of an independent contract. In this case objective grounds for terminating the contract abounded, separate and apart from any attempt by Mr. Umbehr to engage in public discourse on any issue. Mr. Umbehr's continuing failure to abide by the terms of his contract and pay the lawful landfill rates, even after a final money judgment was entered against him for those amounts, were grounds for termination of the contract for cause. Although this cause was not expressly invoked at the time the Commissioners voted, it nonetheless existed and was well known to them.

Even if no objective good cause for termination exists, a government employer has the right to establish that its employee would in fact have suffered the same consequences even if no protected speech act had occurred. See *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, supra.* The same requirement of causation in fact should be recognized where the plaintiff is an independent contractor rather than an employee.

Employees whose responsibilities include policymaking may be terminated on the basis of political affiliation. See *Elrod v. Burns, supra.* An independent contractor whose responsibilities include the formulation of policy should be equally terminable without independent cause.

An employer is only required to make a reasonable investigation to determine whether First Amendment rights are at stake before taking adverse action against an employee. In *Waters v. Churchill, supra,* it was held that no liability would be imposed if the employer reasonably believed on the facts available that no First Amendment issue was presented. Contractors should also be protected only where their rights are reasonably known to the contracting agency.

In this case the lower courts have already established that the applicability of First Amendment guarantees to Mr. Umbehr's complaints was not reasonably established, thereby justifying a grant of personal immunity to them. Only a rule of strict liability for the government agency, rather than the test of reasonable appearances adopted in *Churchill,* could justify a money judgment against the government agency. As a matter of law the rule of *Churchill* should prevent the plaintiff from prevailing against the government agency on these facts.

This court has held that an action for money damages should not be implied in favor of a government employee whose First Amendment rights have been violated, when an adequate remedy already exists by way of administrative appeal or otherwise. In the case of *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) this court

refused to give federal civil service employees the common law right to money damages because a constitutionally adequate remedy was already available to them under federal civil service regulations.

Independent contractors such as Mr. Umbehr already have a constitutionally adequate remedy by way of direct appeal in the state courts. Mr. Umbehr's own appeal in the parallel proceedings clearly established just such a right. In *Umbehr v. Board of Wabaunsee County Commissioners,* 843 P.2d 176, 252 Kan. 30 (1992) the Kansas Supreme Court held that orders of state agencies which would otherwise not be appealable could be reviewed by direct appeal if the complaining party could demonstrate either an illegal or an oppressive act. Illegal acts were defined there as procedurally irregular acts or acts beyond the scope of the government agency's authority. Oppressive acts were defined to include anything which "subjects a person to cruel or unusual hardship through misuse or abuse of authority or power or when it deprives a person of any rights, privileges, or immunities secured by our Constitution or laws." See 252 Kan. at pp. 36-37. Under Kansas law Mr. Umbehr had the right to challenge the termination of his contract as a violation of his rights under the First Amendment by way of a direct appeal. Had he established a violation of any constitutional right, or in the alternative a personal hardship inflicted through abuse of authority, the Kansas courts would have ordered his contract reinstated.

Mr. Umbehr chose to file a federal civil rights action in U.S. District Court rather than seeking any relief by way of appeal to the Kansas State Courts. He did so for the obvious reason that the new contracts with five of the

six towns previously served by him are more lucrative than the old contract. By permitting the old contract to be canceled and then suing for damages he created an opportunity to profit twice. His unilateral decision to waive the right to reinstate the contract and to seek redress in the federal courts should not create a federal remedy where there otherwise would be no need for one. Mr. Umbehr should not be allowed to waive his right to compel the continuation of the contractual relationship and instead seek money damages to be determined by a federal jury.

CONCLUSION

The analysis followed by the Tenth Circuit Court of Appeals ignores the significance of the obligations owed by an independent contractor, and focuses solely on the contractor's economic interests. It ignores the responsibilities of local government to the people, and focuses solely on the inferred intent of individual decision makers.

By ignoring these considerations, the Tenth Circuit Court of Appeals reached the absurd conclusion that the people of Wabaunsee County should pay Mr. Umbehr damages for an alleged spiteful act of their elected representatives, even though these representatives are not personally responsible for the economic harm he alleges. This result cannot and must not stand.

If the vote to terminate Mr. Umbehr's contract did not promote the health, safety and welfare of the people of Wabaunsee County, it was reviewable in state court as

an arbitrary or oppressive act. Plainly there was more than enough evidence confronting the Board of County Commissioners to determine that the people would be benefited by the termination of the contract. Any attempt to reevaluate that evidence and reach a contrary conclusion in a jury trial would be a substitution of the federal court as the sovereign authority in the county, contrary to the Tenth Amendment requirement that the people and the states retain such power.

The will of the people, clearly expressed at the polls, rejecting Mr. Umbehr as a proper person to control government policy in Wabaunsee County, cannot be overridden by resort to U.S. District Court. Nor can the people be punished for their votes by being required to pay Mr. Umbehr damages, as if they had taken from him a property interest in the trash hauling contract by reposing their trust in persons who disagreed with his policies.

The people of Wabaunsee County have wronged no one. They do not deserve to be punished simply because Mr. Umbehr may prove to the satisfaction of a court and jury that he succeeded in fomenting a personal vendetta with elected officials.

The decision of the Tenth Circuit Court of Appeals should be reversed, and the judgment of the United States District Court for the District of Kansas granting

summary judgment to Petitioners on all claims should be reinstated.

Respectfully submitted,

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Petitioners,

v.

KEEN A. UMBEHR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENT

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QUESTION PRESENTED

1. Whether and to what extent the First Amendment protects independent contractors from retaliatory termination based on the content of their speech.

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BRIEF OF RESPONDENT

Respondent, Keen A. Umbehr, owns and operates a refuse collection service in Alma, Kansas, a rural town with a population of approximately 900. He brought suit against the Wabaunsee County Commission, through its individual members, alleging that the Commissioners terminated the parties' ten-year contractual relationship based solely on respondent's public criticism of their official conduct. The district court granted summary judgment to the petitioners, concluding that governmental entities may, without transgressing the First Amendment, predicate the award of government contracts on the content of an individual's

speech. The court of appeals reversed. The question presented in this case is whether and to what extent the First Amendment protects independent contractors from retaliatory termination based on the viewpoints they express.

STATEMENT OF THE CASE

1. *The Contractual Relationship Between the Parties.* Under Kansas law, each county is required to adopt a solid waste management system addressing all aspects of refuse management, including the "collection . . . and disposal" of residential trash. K.S.A. § 65-3402(a)-(b). In implementing this requirement, Wabaunsee County concluded that the "county wide system of waste disposal appears to be the most beneficial" because "there are no cities . . . of sufficient size to maintain a collection and disposal system." D.A. 109.[1] Accordingly, the County Commission in 1981 requested bids from private contractors to provide trash collection services for its residents. D.A. 600; McClure Dep. 25. In response to this invitation, respondent bid on and obtained the contract to collect residential refuse in six rural cities within the County, each of which adopted and ratified the terms of the agreement. P.A. 106. The contract, which was renegotiated in 1985, automatically renewed each year unless either of the parties provided sixty (60) days notice of an intent to terminate. J.A. 22; P.A. 107. Pursuant to this agreement, respondent provided uninterrupted residential collection services to the citizens of the County for a period of ten years.

[1] References to Defendants' Appendix (D.A.) and Plaintiff's Appendix (P.A.) are to the documents submitted to the United States Court of Appeals for the Tenth Circuit. All other citations are to materials proffered to the United States District Court for Kansas.

2. *Respondent's First Amendment Activities and the Commissioners' Response.* In early 1989, respondent began writing a weekly editorial column in the local newspaper entitled "My Perspective," which provided information and respondent's views on an array of issues involving the Board of Education, the local City Council, and the Wabaunsee County Commission. P.A. 57. In conjunction with his journalistic efforts and out of a general interest in county governance, respondent also attended and participated in meetings of the various local governing bodies. J.A. 22.

Although respondent's articles touched on issues ranging from the opening of the local pool, P.A. 59, to the participatory responsibilities of citizens in a democracy, P.A. 63, a number of his columns were critical of both the manner in which the Wabaunsee County Commission conducted its duties and the substantive policies that it adopted. Among the topics he addressed were: limitations on access to public records by the County government in violation of the Kansas Open Records Act (KORA), K.S.A. § 45-216; the use of government property for the benefit of private citizens and businesses; closed-door sessions of the County Commission in violation of the Kansas Open Meetings Act (KOMA), K.S.A. § 75-4317; overt efforts by the Commissioners to stifle critical press coverage; and the misuse of official powers by individual Commissioners. J.A. 22. During the period from early 1989 through the date of termination in January of 1991, respondent's commentary on these subjects resulted in a series of bitter and public disputes with the County Commissioners.

The first issue to generate friction between respondent and petitioners involved the Commission's policies on access to public records. To document his articles and to facilitate his participation in public meetings, Umbehr periodically

requested copies of records from the County Clerk. Until early 1989, the County's policy had been to charge ten cents per page for public documents. D.A. 376. As a direct result of Umbehr's requests, however, D.A. 378, the county adopted a new records acquisition policy, which required a written request and a three-day waiting period in addition to imposing a dramatically increased fee structure. D.A. 376.

In an article dated February 15, 1989, respondent took exception to this change in policy. P.A. 56. He suggested that the Commissioners were attempting to impede public access to records to deflect inquiries into the manner in which county affairs were operated. *Id.* "As long as they can keep us in the dark by making open records difficult to obtain," he wrote, "then they can run the county any way they please without having to answer to their tax-paying constituents. It is in this medium that political corruption can thrive without fear of exposure." *Id.*

The open records issue arose again several months later during a meeting held to discuss the details of the County budget. Prior to the meeting being called to order, respondent requested a copy of the proposed budget. P.A. 52, 72. County officials, however, indicated that additional copies were not available for members of the public and instead insisted that respondent comply with the new records policy, which would have required a written request and an ensuing waiting period. *Id.*

Since the Commissioners ostensibly had convened the meeting to permit citizen input, D.A. 406, Umbehr suggested that if the "budget hearing [is] going to have any validity, then the Commissioners should, in fact, provide extra copies of the budget to any member of the public who wishe[s] to see it." P.A. 72. Commissioner Spencer dismissed this simple request

stating, "Umbehr, you're just full of bull----. You're nothing but a damn troublemaker." *Id.*; D.A. 502.

At that point, Umbehr explained that he had conducted his own research on the issue and that "their policy on obtaining records was in violation of the Open Records Act, KSA 45-215 through KSA 45-223." P.A. 72. When the County Attorney concurred with respondent's assessment, the Commissioners relented and provided respondent with a copy of the document. *Id.*; D.A. 409.

Based on these events, respondent filed a letter of complaint with the County Attorney alleging that the County's policy regarding public access to records was in violation of the Open Records Act. K.S.A. § 45-216. In a series of columns discussing this issue, Umbehr explained that the open records provisions of Kansas law serve an essential function by permitting citizens to monitor and oversee the conduct of their elected officials. P.A. 77. He maintained that the Board, in derogation of this statutory purpose, had established a policy "that dissuades, frustrates, and inhibits public access to open records[.]" P.A. 72. After a review of these allegations and the requirements of the KORA, the County Attorney concluded that the fee schedule did indeed impose costs in excess of those permitted by statute. D.A. 537.

Another set of respondent's articles focused on the use of equipment belonging to the County Road and Bridge Department for the benefit of private individuals and entities. In a May 18, 1989 article, Umbehr reported that he had observed county equipment and personnel at work on a private project for three full days. P.A. 49, 60. He expressed his opinion that such practices represent "mismanagement of taxpayer money . . . [and] county resources." P.A. 60-61. In a column published on June 1, 1989, Umbehr discussed the

County's contention that the project involved an exchange of work or an in-kind transaction between the parties. P.A. 62. He noted that neither the County Commission nor the Road and Bridge Department kept any records concerning this exchange or the many other "trade-offs" that took place between the Department and private entities. *Id.* Because there was no way to verify that taxpayer resources were being used for appropriate government projects, Umbehr argued that the practice created too many opportunities for abuse and thus should be discontinued. *Id.*

The County Attorney was sufficiently concerned about the allegations contained in respondent's articles, as well as information supplied by County employees in the wake of these articles, that he referred the matter to the Attorney General of Kansas for investigation. P.A. 50; D.A. 157. In the interim, however, he specifically advised the Commission to cease this practice. P.A. 92; D.A. 156, 498, noting that, without adequate recordkeeping, "favoritism inevitably finds its way into the system." P.A. 50; D.A. 156. Despite these admonitions, the Commissioners declared that they were comfortable operating in "the gray areas" of the law. P.A. 92. Although they recognized that state statutes required a more rigorous accounting of such work "trade-offs," the Commissioners maintained that actual documentation simply was not necessary. D.A. 381, 383.

After an extensive inquiry conducted by the Kansas Bureau of Investigation, the Attorney General of Kansas issued a report on December 29, 1989, which confirmed respondent's allegations of improprieties in the Wabaunsee County Road and Bridge Department. D.A. 157-59. The Attorney General found that taxpayer funds and resources had been improperly used by county employees and that county

equipment and personnel had been devoted to projects that had at best "a limited public purpose." D.A. 158. He also emphasized that "documentation of such projects should be maintained whenever undertaken by county personnel or with county equipment where there is a benefit to private citizens or businesses." *Id.* Although the report found no malfeasance on the part of the Commissioners themselves, it concluded that "loose administrative practices and accounting procedures" made it difficult to determine whether county resources were being properly employed. *Id.*

Several months after respondent began writing his column, the Commissioners attempted to silence the criticism by targeting the vehicle for his expression -- the local newspaper. As the publication with the largest circulation in the County, the *Signal-Enterprise* had always served as the official newspaper, which entitled it to receive all legal notices and advertisements from the County government. On May 31, 1989, the Commissioners summoned the editor of the paper to a public meeting. D.A. 154. Commissioner Heiser stated bluntly that the "*Signal-Enterprise*, being the Official County Paper, needs to give more consideration to the letters being printed and possibly take a second look at what is put in the paper, to avoid anyone getting in trouble." P.A. 92. When respondent, who was present at the meeting, asked the Commissioner precisely what he meant by "taking a second look" at articles being published, the Commissioner expressed his view that respondent's articles were "offensive" and "*should be censored*" to ensure that they were "truthful." *Id.* (emphasis added); P.A. 90.

In a front page story appearing on June 1, 1989, the editor denounced the Commissioners' efforts to control the content of an independent newspaper. "I have been associated

with *The Signal-Enterprise* for 38 years," the editor wrote, "and have never been threatened for running signed articles or Letters to the Editor until this past Wednesday." D.A. 154. He indicated that "[w]e have no intention to censor anyone's articles regardless of high pressure tactics." *Id.* As a consequence, when the County designation came up for renewal in January of 1990, the Commissioners stripped the *Signal-Enterprise* of its official status and transferred the designation to a smaller paper in a neighboring community. P.A. 53, D.A. 493.[2]

In his June 22, 1989 column, respondent recounted the events that took place during the most recent meeting. P.A. 64. Elected officials, respondent opined, must be willing to endure, even welcome, oversight of their official actions by the citizens they represent. *Id.* "When public exposure of official county actions makes our commissioners angry and want to stop newspaper articles that express a viewpoint that is different from theirs, then obviously their actions cannot stand up to the scrutiny of the public." *Id.*

Open access to County affairs again became an issue when the Commissioners expelled all members of the public, including Umbehr, from a public meeting held on June 18, 1989. During that gathering, the Commissioners went into "executive session" to discuss the accusations concerning the County Road and Bridge Department. In his column, Umbehr charged that this action violated the Kansas Open Meetings

[2] Although the Commissioners maintained that they simply wanted to rotate the official designation, they acknowledged that the *Signal-Enterprise* had always been the official paper and that the designation had never rotated previously. D.A. 501. Tellingly, the official designation returned to the *Signal-Enterprise* one year later after the paper was sold to a new owner who refused to publish Umbehr's articles. P.A. 51, 97.

Act, K.S.A. § 75-4317, which prohibits officials from conducting business in closed session, and he noted that he had referred the matter to the Attorney General for investigation. P.A. 67.

In August 1989, the Attorney General determined that the Commission had indeed violated the provisions of the KOMA by closing its meeting to members of the public. P.A. 71. Shortly thereafter, the Commissioners agreed to a consent decree imposed by the state under which they acknowledged that they had violated the statute and agreed to abide by its terms in the future. *Id.* The consent decree also required that each Commissioner receive a copy of the KOMA and that the County Attorney provide remedial instruction -- in open session -- on the requirements of the Act. *Id.* The County Attorney conducted the required counseling on November 1, 1989. P.A. 53.

On the heels of these events, the Commissioners voted on February 5, 1990, to terminate Umbehr's contract. The purported reason for doing so was not any dissatisfaction with his service or a desire to alter the existing county-wide system of collection services but rather that the contract was signed by "a number of officials that are no longer in office . . . ." D.A. 164. In their notice of termination, however, the Commissioners mistakenly cited the 1981 agreement between the parties, which was no longer in effect, and thus the contract continued for another term. P.A. 81; D.A. 165. The Commissioners agreed, however, that the contract would be terminated the following year. P.A. 96.

On March 29, 1990, one month after the unsuccessful effort to sever the contractual relationship, the Commissioners voted to increase user rates at the landfill for the fourth time since respondent began writing his articles, this time doubling

his disposal bill from $1200 to $2400 a month. P.A. 54, 84, 94; D.A. 170A. Over nearly unanimous opposition from the city councils, P.A. 84; D.A. 171, the new rates went into effect on June 1, 1990. On that date, respondent filed an action in state court contending that the rates were unsupported by any factual data. D.A. 178. The state court eventually agreed, finding the rates to be arbitrary and capricious and retroactively enjoining their application. P.A. 120-21 (rates were "a shot in the dark").[3]

Over the course of the next year, respondent continued to speak out on local political issues both in his column and during his unsuccessful bid for a seat on the County Commission.[4] Umbehr's criticism of the Commissioners' policies engendered mounting resentment and hostility, which often manifested itself in abusive verbal attacks against him during public sessions of the Commission. For instance, in March of 1990, shortly after the Commission had voted to terminate his contract, respondent asked for permission to address the Board. In response, Commissioner Spencer asked respondent if he was prepared to "get down on [his] knees and beg" for permission to address the Commission. P.A. 81, 87; D.A. 504. When Umbehr made a similar request in late May, Commissioner Heiser told him he could either "be quiet" or he would be physically removed from the meeting by a

[3] Based on a motion for reconsideration, the court subsequently concluded that Umbehr did not comply with the statute of limitations and thus dismissed the case on grounds unrelated to the merits. *Umbehr v. Board of County Commissioners*, No. 90-C-15 (October 1, 1990), *rev'd*, 825 P.2d 1160 (Kan. Ct. App.), *rev'd*, 843 P.2d 176 (Kan. 1992).

[4] Umbehr officially declared his candidacy on November 29, 1989. P.A. 80. If elected, he would have been precluded from voting on his own contract. K.S.A. § 75-4304.

sheriff's officer. P.A. 85; D.A. 612. And a few months later, again during public session, Commissioner Spencer told Umbehr that he was nothing more than "trash, the stuff he hauled around in his trucks." P.A. 87; D.A. 451, 504.

As the renewal decision approached, the cities, as they had the year before, contacted the Commissioners to express their satisfaction with the existing contractual arrangement and to request that the contract be renewed. McClure Dep. 230. Despite these requests, the Commissioners terminated the contract between the parties on January 28, 1991. Ex. 65.

Although they had expressed no dissatisfaction with the county-wide method of refuse collection when they had attempted to cancel the agreement just eleven months earlier and indeed had indicated the contract would be renewed, D.A. 164, 350, the Commissioners now alleged that the contract was cancelled because the County had no interest in solid waste collection. Ex. 65; D.A. 346-47, 510. The Commissioners reached this conclusion without ever reviewing the solid waste management plan, consulting with authorities, conducting research, D.A. 346-47, 508, or amending the existing plan, as required by law. K.S.A. §§ 65-3405(a), (g). They also acknowledged that the county-wide plan had been adopted to obtain a lower collection rate for citizens of the County by providing a larger market to bidders. P.A. 91; D.A. 345.

In addition to the circumstantial evidence suggesting that the Commissioner's rationale was pretextual, one Commissioner frankly admitted that the relationship was terminated because it provided respondent with "a platform to cause a lot of problems with the county . . . [and] gave him an excuse to come into our meetings." P.A. 89. One year later, Commissioner Spencer publicly noted that "[w]e've been

from any adverse action based upon application of the test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968). J.A. 14. Relying on a line of cases holding that independent contractors enjoy no First Amendment protection from actions based on party affiliation, the district court held that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." J.A. 14.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit reversed. J.A. 21. The court of appeals concluded that independent contractors are entitled to First Amendment protection for speech on matters of public concern and that governmental entities may not use their economic relationships to suppress public criticism of their actions. J.A. 37. In reaching this result, the court found that the patronage cases cited by the district court had "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." *Id.* It noted that by allowing "governments to terminate a public contract because of the contractor's speech, courts have permitted governments to accomplish indirectly that which they cannot accomplish directly -- punishment of speech they do not like." J.A. 33.

The panel also found that the loss occasioned by termination of a contract is no less constitutionally cognizable than the loss suffered by an employee. J.A. 35-36. Government efforts to suppress public dialogue and debate, the court observed, "'can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent.'" J.A. 36 (citation omitted). Based on its findings,

the court of appeals remanded the case for trial.[6] A subsequent petition for rehearing and a suggestion for rehearing in banc were rejected. J.A. 21. This Court granted certiorari on June 29, 1995. 115 S. Ct. 2639 (1995).

SUMMARY OF ARGUMENT

The First Amendment, in its most fundamental application, protects the right of every citizen to challenge the wisdom and propriety of government actions and to engage in vigorous public debate on issues of government policy. Indeed, viewpoint-based efforts to restrict or punish speech on matters of public concern are subject to the most exacting constitutional scrutiny. The burden in any particular case of demonstrating the propriety of a less rigorous standard of review is borne by the government.

As the court of appeals correctly concluded, the termination of a public contract, like the denial of any other government benefit, in retaliation for an individual's expressive activity serves as an effective deterrent to speech. Because such economic reprisals permit governmental entities to accomplish a result they could never achieve directly -- the punishment of ideas which those in power find displeasing -- adverse actions premised on speech impose an intolerable burden on freedom of expression. The government may not, therefore, use its contractual agreements as an instrument to control or suppress speech.

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[6] In light of what it perceived as conflicting authority, the court of appeals affirmed the district court's grant of qualified immunity. J.A. 38. This Court denied respondent's Conditional Petition for Certiorari on this issue. *Umbehr v. Heiser*, 115 S. Ct. 2616 (1995).

Moreover, unlike the employment context, in which the government "has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the government, in its role as contracting agent, has no unique interests that would justify a deviation from traditional strict scrutiny standards. As an employer, the government retains considerable latitude to regulate public employee speech based on its legitimate interests in avoiding workplace disruptions and fostering healthy working relationships. These factors, however, cannot justify similar limitations on the First Amendment rights of public contractors who typically function outside of a traditional office atmosphere. Speech on matters of public concern may serve as a basis for public contracting decisions, therefore, only if necessary to further a vital government interest.

The Commissioners, in contrast, advance a far different vision of the First Amendment, a vision that is fundamentally at odds with the traditional protections afforded to speech on matters of public concern. In essence, they advocate the creation of an independent contractor exception to the First Amendment, a separate jurisprudential category that places the expressive activity of public contractors, even on core political issues, beyond the protective scope of the First Amendment. This categorical approach is based not on any legitimate interest in regulating speech, but solely on claims of administrative necessity, including the unsupported assertion that any limitation on the discretionary authority of local officials will interfere with their ability to provide needed services. No legal doctrine nor sound public policy rationale justifies the sweeping authority the Commissioners

request. Government officials neither need, nor do they possess "unfettered discretion" to allocate government resources free from fundamental constitutional limitations on their authority.

At bottom, there is no room within the confines of the First Amendment for a governmental privilege to retaliate against speech. This Court, therefore, should affirm the decision of the court of appeals. In addition, because the Commissioners are unable, regardless of the standard applied, to demonstrate any legitimate interest in regulating respondent's speech, the Court should conclude that the expression involved in this case is protected by the First Amendment. Accordingly, it should remand to the United States District Court solely for a factual determination concerning whether the termination was motivated by respondent's expressive activity or by legitimate considerations unrelated to the suppression of speech.

ARGUMENT

I. Retaliation Against Independent Contractors For Speech On Matters Of Public Concern Can Be Justified Only By A Compelling Interest

A. Speech On Matters Of Public Concern, Regardless Of The Identity Of The Speaker, Is Entitled To The Utmost Protection

The guarantees of the First and Fourteenth Amendments expressly prohibit state and local governments from taking any action "abridging the freedom of speech." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 (1952). This fundamental principle of our democratic system "enable[s] every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them." *Wood v. Georgia*, 370 U.S. 375, 392 (1962) (citation omitted). Recognizing that "[t]hose who won our independence believed . . . that public discussion is a political" obligation, this Court has emphasized that it "is as much [the citizen's] duty to criticize as it is the official's duty to administer." *New York Times v. Sullivan*, 376 U.S. 254, 270, 282 (1964).

Respondent's speech, which challenged the policies of the County Commission on issues ranging from the appropriate use and allocation of taxpayer resources to the ability of county residents to obtain information about the operation of their government, falls squarely within the core of the First Amendment's protections. Citizen participation in public dialogue concerning the manner in which the

government operates and the policy choices it makes is critical to the proper functioning of our system. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U.S. at 270, this Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted).

Not only the content of respondent's speech, but the medium in which it was expressed -- a weekly editorial column in the newspaper -- dictates special solicitude and protection. Cf. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (level of protection is dependent on "content, form, and context of a given statement"). Like other forms of political speech, "the expression of editorial opinion" occupies a central position in First Amendment jurisprudence. *FCC v. League of Women Voters of California*, 468 U.S. 364, 381 (1984). "[B]y informing and arousing the public, and by criticizing and cajoling those who hold government office," editorials ensure that the public "receiv[es] a wide variety of ideas and views" on issues confronting the polity. *Id.* at 382. Attempts "to restrict precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect" are subject to the most exacting scrutiny. *Id.* at 383-84.

Notwithstanding the core political nature of the speech at issue here, the Commissioners suggest that the respondent's expressive activity remains unprotected unless the Court elects to extend the rights enjoyed by public employees to independent contractors. Pet. Br. at 11. The Constitution

itself, however, guards the basic liberties of all citizens, and thus there is no need to *extend* the First Amendment's guarantees to independent contractors. Nor does speech lose its protected status simply because it has been uttered by a particular class of persons or entities. The "identity of the speaker," this Court has held, does not deprive "speech of what otherwise would be its clear entitlement to protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777-78 (1978). Respondent's status as a government contractor, therefore, has no independent constitutional significance.

Rather, speech on matters of public concern is entitled to the highest constitutional protection unless the government can establish that it has some interest which warrants application of a less searching standard of review. Absent a showing, for example, that the nature of the relationship between the speaker and the government implicates special governmental interests, see, *e.g.*, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (school officials may regulate student speech "even though the government could not censor similar speech outside the school"); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (state has interests as employer that are not applicable to general population), viewpoint-based limitations on First Amendment freedoms are presumptively invalid. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). In the instant case, the burden of demonstrating that the contractual relationship provides a legitimate basis for curtailing or eliminating all protection for speech by independent contractors rests squarely on the Commissioners -- a burden they have not and cannot meet. See *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013

(1995) (government must justify adverse actions based on speech); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (government bears burden of demonstrating interest in restricting First Amendment rights).

B. Termination Of A Public Contract In Retaliation For Speech Impermissibly Restricts Protected Expression

For purposes of deciding the Commissioners' motion for summary judgment, the district court and court of appeals, drawing all inferences in favor of respondent as the non-moving party, assumed that the evidence in the record was sufficient to support a finding of retaliatory intent. J.A. 14, 24-26. The question presented to this Court, therefore, is whether the termination of respondent's contract in retaliation for the viewpoints he expressed states a cognizable First Amendment claim or if, as the district court held, independent contractors enjoy no First Amendment protection for speech on matters of public concern.

The Commissioners contend that the termination of a contract in response to speech, as opposed to more direct forms of regulation, does not raise substantial First Amendment concerns. Pet. Br. at 26. Restrictions on speech, however, need not directly proscribe expressive activity to run afoul of the First Amendment. Instead, "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). This principle forbids government officials from using the economic benefits they dispense as leverage to deter either critical speech or the

exercise of other constitutional guarantees. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right" in exchange for a discretionary benefit. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317 (1994). See also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

By withholding or withdrawing an economic advantage based on an individual's expressive activity, the government imposes what amounts to a penalty on the exercise of core personal freedoms. "To deny a [benefit] to [individuals] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). See also *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140 (1987) (requiring work on the Sabbath as a condition for unemployment compensation "puts the same kind of burden upon the free exercise of religion as would a fine"). Because direct efforts to limit or penalize speech would clearly be impermissible, the same result may not be achieved indirectly by using government benefits as a form of economic coercion. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

This doctrine applies in any number of contexts and prohibits attempts to condition the receipt of a government benefit, whether it be employment, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990); *Pickering*, 391 U.S. at 568; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967), unemployment benefits, *Hobbie*, 480 U.S. at 140, tax exemptions, *Speiser*, 357 U.S. at 518, or even public contracts, *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973), on an individual's exercise of fundamental rights. "While the compulsion may be indirect, the infringement upon free

exercise is nonetheless substantial." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981).

This Court has concluded on numerous occasions that the failure to renew a contract based on expressive activity imposes impermissible burdens on First Amendment interests. In *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), for example, college officials elected not to renew a professor's contract at the end of its term, allegedly in response to various statements he made before the state legislature. This Court, in an oft-cited passage, emphatically rejected the suggestion that the relationship, which had expired under its own terms, could be discontinued based on the individual's speech.

> [E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow government to "produce a result which [it] could not command directly."

Id. at 597 (citation omitted). See also *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 413 (1979) (refusal to renew contract based on expression); *Mt. Healthy v. Doyle*, 429 U.S. 274, 282 (1976) (same); *Keyishian*, 385 U.S. at

592, 605 (refusal to renew contract for failure to sign loyalty certificate).

Similarly, in a challenge based on the Fifth Amendment, this Court in *Lefkowitz v. Turley*, 414 U.S. 70 (1973), held that the State of New York could not require independent contractors to waive their rights against self-incrimination as a condition of receiving government business. The threatened loss of revenue, this Court held, impermissibly required contractors to forgo fundamental constitutional protections. *Id.* at 82. In assessing the coercive effect of the state's action, the Court rejected the suggestion that there is "a difference of constitutional magnitude between the threat of a job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Id.* at 83.

Based on these principles, the court of appeals properly concluded in this case that a rule which permits government officials to base contracting decisions on expressive activity would allow "governments to accomplish indirectly that which they cannot accomplish directly -- punishment of speech they do not like." J.A. 33-34. While the Commissioners were free under the terms of the contract to terminate the relationship "for any reason or for no reason at all," *Rankin v. McPherson*, 483 U.S. 378, 383 (1987), they were not entitled to use the contractual relationship as a method of curtailing or penalizing speech they found offensive. *Id.* at 383-84.

There is little doubt that the government's use of speech as a criterion in awarding contractual benefits poses a significant risk of stifling or chilling free and open debate. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("threat of sanctions may deter [the] exercise of [First Amendment rights] almost as potently as the actual application of sanctions").

"The freedom of speech and of the press guaranteed by the Constitution," this Court has stressed, embraces the liberty to discuss matters of public concern without "fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). Absent First Amendment protection, the threat "of subsequent punishment" creates a powerful deterrent to critical commentary by those who wish to retain or hope to secure contractual agreements with the government. *Pickering*, 391 U.S. at 574. To preserve their economic viability, independent contractors would be forced to engage in a form of self-censorship, weighing the benefits of expressing their opinions against the potential costs associated with losing current or future contractual relationships. Cf. *Thomas*, 450 U.S. at 717-18 (eligibility requirements required individual to choose between religious beliefs and benefits). Permitting the award of public contracts on the basis of expressive activity, therefore, "necessarily will have the effect of coercing the [contractor] to refrain from the proscribed speech." *Speiser*, 357 U.S. at 519. See also *Minneapolis Star & Tribune*, 460 U.S. at 585 (financial burdens "can operate as effectively as a censor to check critical comment"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (restrictions on compensation have direct effect on incentives to speech).[7]

[7] The sheer magnitude of the government's presence in the marketplace and, concomitantly, its ability to influence the nature and scope of public discussion through its contractual relationships is staggering. During fiscal year 1994, for example, the federal government alone expended over $196 billion on procurement contracts. OFFICE OF MANAGEMENT AND BUDGET, FEDERAL PROCUREMENT REPORT 7 (1994). Were government officials permitted to allocate these resources based on expressive activity, the collective chilling effect on speech, to say the least, would be substantial.

Against this backdrop, therefore, it is not surprising that the courts of appeals, almost without exception, have readily acknowledged that independent contractors and other individuals in non-employment relationships with the government are entitled to First Amendment protection from retaliation based on the content of their speech. In addition to the decision of the Tenth Circuit in this case, J.A. 21, and in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990) (tow truck referrals may not be discontinued in retaliation for political opposition), four other circuits have determined that independent contractors and other non-employees are protected by the First Amendment from retaliatory actions premised on their public criticism of government officials. *Blackburn v. City of Marshall*, 42 F.3d 925, 934 (5th Cir. 1995) (adverse action against tow truck operator for criticizing bidding methodology); *Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) (termination of contractor providing vending services in state capitol building); *North Mississippi Communication v. Jones*, 792 F.2d 1330 (5th Cir. 1986) (removal of county designation from local paper in retaliation for critical editorials); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (assuming without deciding that tow truck operator could state a retaliation claim);[8] *Havekost v. U.S. Dep't of Navy*, 925 F.2d 316 (9th Cir. 1991) (licensee working in navy

[8] Cf. *Termite Control Corp. v. Horowitz*, 28 F.3d 1335, 1353 (2d Cir. 1994) (independent contractor may state claim for equal protection violation based on retaliation for the exercise of First Amendment rights). But cf. *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122, 128 (2d Cir. 1995) (remanding for decision on scope of First Amendment protection for government contractors and suggesting circuit has not yet adopted a position).

commissary may state claim for retaliatory termination); *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989) (independent contractor physician entitled to protection for speech on matters of public concern).[9] These decisions properly conclude that the retaliatory use of public contracts as a vehicle for affecting public debate is no more permissible than efforts to punish speech directly or through the discriminatory allocation of other government benefits.

Finally, it is important to note that the Commissioners admit in this Court, as they did in the district court, that this case does not involve the allocation of a government contract based on political affiliation. Pet. Br. at 15.[10] Accordingly, the Court need not address or resolve the question of whether patronage practices can be justified as an exception to the First

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[9] Only one circuit court has taken a contrary view, and it provided no analytical justification for its decision. In *Downtown Auto Parks v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), the Seventh Circuit, in a footnote, uncritically extended its previous conclusion that independent contractors are not shielded from patronage practices to an action involving retaliation for speech. *Id.* at 709 n.5. See also *Lewis v. Hager*, 956 F.2d 1164 (6th Cir. 1992) (unpublished opinion) (*Perry* does not apply to independent contractors). In the district court, the Commissioners cited this holding in support of their contention that local officials enjoy "a type of exempt or privileged retaliation," D.A. 656 -- a "privilege" that is antithetical to well-established First Amendment principles.

[10] In their reply in support of summary judgment, the Commissioners stated, "[d]efendants will be the first to concede that no patronage was involved." D.A. 657.

Amendment rights otherwise enjoyed by independent contractors.[11]

Therefore, assuming that respondent's contract with Wabaunsee County was terminated in response to his criticisms of the Commissioners' policies, respondent unquestionably has stated a cognizable claim under the First Amendment. The question remains, however, what standard should apply in assessing claims of retaliation by independent contractors.

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[11] Despite relying extensively in the Petition for Certiorari on a series of decisions addressing the patronage issue, the Commissioners do not even cite, much less discuss, the cases that they claim created a decisional split in the circuits. Pet. Cert. at 13-18. Nonetheless, the court of appeals correctly concluded that the patronage decisions have "limited relevance" in cases involving retaliation for speech. J.A. 37. Patronage has been justified primarily based on its historic roots, which some have suggested provide the practice with a distinct, non-textual, constitutional status, *Rutan*, 497 U.S. at 96-97 (Scalia, J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 377-78 (1976) (Powell, J., dissenting), and based on various systemic benefits, which include strengthening the two-party system, motivating political participation, and improving political accountability. *Rutan*, 497 U.S. at 104-110 (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 527-31 (1980) (Powell, J., dissenting); *Elrod*, 427 U.S. at 379 (Powell, J. dissenting).

Whatever merit these principles have in the patronage context, they provide scant support for the contention that governmental entities are immune from liability when they attempt to punish independent contractors for speech. To be sure, officially-sanctioned retaliation against disfavored views enjoys no rich history in the Republic and advances no goals that are consistent with our democratic tradition. As Justice Powell recognized, even if patronage dismissals of public employees were constitutionally permissible, employees would still be entitled to First Amendment protection from retaliation based on speech because "no substantial state interest justifie[s] the infringement of speech." *Branti*, 445 U.S. at 527 (Powell, J., dissenting).

C. Unlike The Public Employment Context, The Government Has No Special Interests In Regulating The Speech of Independent Contractors

The appropriate inquiry in this case is not, as the Commissioners would have it, whether the *protections* provided to public employees by this Court should be extended to independent contractors, but rather whether the special *limitations* placed on the free speech rights of public employees should similarly restrict the interests of individuals in non-employment economic relationships with the government. Based on the lack of any comparable government interest in regulating the speech of independent contractors, the balancing test used to assess the extent of public workers' First Amendment interests is inapplicable.

In each of its public employment cases, this Court has stressed that while citizens may not be "deprived of fundamental rights by virtue of working for the government," *Connick*, 461 U.S. at 147, the government, in its role as employer, has unique interests that are not present when it attempts to regulate the speech of the population generally. See, *e.g.*, *NTEU*, 115 S. Ct. at 1012; *Waters v. Churchill*, 114 S. Ct. 1878, 1886-87 (1994); *Pickering*, 391 U.S. at 568. Accordingly, the Court in *Pickering* adopted a test for public employee speech that reflects the government's heightened interest in regulating the speech of the individuals it employs. First, while private citizens have First Amendment protection even for speech that does not touch on major issues of the day, public employees must generally establish that their speech involves matters of public concern. *Waters*, 114 S. Ct. at 1887; *Connick*, 461 U.S. at 147. Second, even if the

speech involves a matter of public interest, the court must still balance the employee's interest in participating in public debate against the State's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142.[12]

The government's interest in regulating speech in the office environment is premised on considerations that are unique to that context and reflect the special characteristics of the relationship. For example, the government, like any employer, must be able to foster healthy working relationships among its personnel including the maintenance of "discipline by immediate supervisors" and "harmony among coworkers." *Pickering*, 391 U.S. at 569-70; *Rankin*, 483 U.S. at 388. As a result, the government may take adverse action against employees for using offensive language in the office, undermining superiors through recalcitrant speech, or counseling others to ignore legitimate instructions. *Waters*, 114 S. Ct. at 1886. It also has an interest in ensuring that speech does not have "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," and does not "impede[] the performance of the speaker's duties . . . ." *Rankin*, 483 U.S. at 388. Due to secondary effects of speech in the office environment,

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[12] Several courts have committed the same analytical error as the Commissioners by concluding that public employees have special First Amendment rights that the Court has not conferred on the remainder of society. In *Ambrose v. Knotts*, 865 F. Supp. 342 (S.D. W. Va. 1994), the court held that *Pickering* and *Connick* "create[d] a very limited, specific, free-speech protection for public employees. *It did not create a general protection resident in the population as a whole.*" *Id.* at 345 (emphasis added); *Blackburn*, 42 F.3d at 931 (noting that district court had improperly inverted the public employee analysis).

therefore, the government is permitted to take adverse action against an employee based specifically on the content of the communication, an action that would be highly suspect in other settings. See, *e.g.*, *Bellotti*, 435 U.S. at 786.

These considerations, however, do not apply to independent contractors who are not in employment relationships with the government. The government's interest in regulating the speech of its employees to ensure proper management and direction of its personnel, for instance, has no relevance to independent contractors like respondent who have no daily interaction with government superiors or co-workers. *NTEU*, 115 S. Ct. at 1012, 1015 (government generally must establish speech is disruptive to workplace); *Pickering*, 391 U.S. at 569-70 (government has no interest in controlling speech that does not interfere with daily working relationships). Similarly, independent contractors generally are not viewed as representatives of the government and thus the public does not perceive their speech as an indication of government policy. Cf. *Rankin*, 483 U.S. at 389 (statement made by employee in private could not be construed by public as position of department); *Hazelwood*, 484 U.S. at 271 (public may perceive school newspaper or play as bearing "imprimatur" of school); *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985) (individual properly terminated after he identified himself as an employee of the sheriff's office and a recruiter for the Ku Klux Klan). The nexus between speech and the government's interest in promoting efficiency, therefore, is extremely attenuated in the independent contractor context. Adverse action, therefore, rather than promoting legitimate state interests, will often serve only to punish or deter speech. See *NTEU*, 115 S. Ct. at 1015.

Based on this analysis, the Fifth Circuit concluded that the restrictions applicable to government employees should be applied only in situations that mirror the employer-employee relationship. Observing that public employees' First Amendment rights are considerably more circumscribed than those of the general public, the court in *Blackburn*, 42 F.3d at 931-34, concluded that the government possessed no comparable interest in limiting the First Amendment rights of a tow truck operator who was not in the employ of the city and had no daily interaction with other city workers. *Id.* Accordingly, because the deprivation was unrelated to any legitimate government interest, the court concluded that the city had violated the plaintiff's First Amendment rights by relying on impermissible considerations in allocating a government benefit. *Id.*[13]

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[13] Petitioners' discussion of the differences between independent contractors and employees, which is supported by neither case precedent nor academic literature, attributes a misleading degree of homogeneity to independent contractors. Pet. Br. at 17-23. Independent contractor relationships occupy a vast spectrum, from arrangements, like this one, in which the contractor completes his responsibilities with little or no day-to-day oversight to those in which the independent contractor is virtually indistinguishable from an employee. *Logue v. United States*, 412 U.S. 521, 531-32 (1973) (contractor will often perform tasks "that would otherwise be performed by" employees). Admittedly, application of the *Pickering* test may be appropriate in situations that are sufficiently similar to employment. See, *e.g.*, *Copsey*, 36 F.3d at 1344-45; *Havekost*, 925 F.2d at 318 (*Pickering* is appropriate test for licensee working in naval station commissary); *Smith*, 870 F.2d at 1381 (applying *Pickering* where "there is an association between the independent contractor doctor and the Hospital that ha[s] similarities to that of an employer-employee relationship"). Cf. *White Plains Towing*, 991 F.2d at 1059 (assuming without deciding that *Pickering* applies to relationships that are "tantamount to employment").

The court of appeals in the instant case, by concluding without analysis that the *Pickering* test should be applied to the speech of independent contractors, adopted an approach that is unduly restrictive of First Amendment interests. J.A. 37. Without the unique considerations present in the office environment, an adverse action taken against an independent contractor based solely on the viewpoint being expressed warrants application of strict scrutiny. "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *League of Women Voters*, 468 U.S. at 383-84 (citation omitted). See also *Simon & Schuster*, 502 U.S. at 115-16 (content-based restrictions on speech are presumptively unconstitutional); *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). Outside of the employee speech context, this Court has subjected government actions that place an impermissible condition on the receipt of a benefit or privilege, like direct restrictions on these same interests, to strict constitutional scrutiny. *Rutan*, 497 U.S. at 78 (conditioning employment on political belief constitutes an unconstitutional condition and may be justified only by demonstrating a vital government interest); *Hobbie*, 480 U.S. at 140-41 (to justify denial of benefits on grounds that infringe First Amendment interests government must demonstrate compelling interest narrowly tailored to accomplish goal). See also *Speiser*, 357 U.S. at 519.[14] As a result, at least as to

[14] Because the speech in this case clearly relates to matters of public concern, the Court need not address whether contractors, like the citizenry generally, are shielded from retaliatory action against purely (continued...)

independent contractors who function outside of a traditional employment context, adverse actions premised on expressive activity may be justified only if they serve a vital or compelling government interest.

D. Regardless Of The Test Applied, Termination Of Respondent's Contract Based On The Speech Involved In This Case Would Violate The First Amendment

After concluding as a general matter that independent contractors are protected from retaliation for speech on matters of public concern, the court of appeals in this case did not attempt to determine whether respondent's speech would be protected under the test it adopted. "The ultimate question -- whether the speech is protected -- is a question of law." *Rankin*, 483 U.S. at 386 & n.9. See also *Connick*, 461 U.S. at 150 n.10. Resolution of this issue is appropriate at this time given that discovery is complete, P.A. 25, and the parties have briefed the issue before both lower courts. *New York Times v. Sullivan*, 376 U.S. at 283-84 (effective judicial administration favors review of evidence to determine scope of protection). Based on the record in this case, the Court should hold that, under either standard, the Commissioners have failed to establish a sufficient interest in regulating respondent's speech on matters of public concern. As a result, respondent is entitled to prevail on his First Amendment claim if on remand he succeeds in demonstrating

[14](...continued)
private speech. See *Connick*, 461 U.S. at 147 (outside employment context First Amendment protects mundane as well as political speech).

that the Commissioners terminated his contract in retaliation for his public criticism of their conduct.

1. Under Strict Scrutiny, Termination of Respondent's Contract Based On His Speech Would Be Impermissible

Application of the traditional strict scrutiny standard for viewpoint-based restrictions on speech is appropriate here because respondent operated independently of any government supervision. As the Commissioners note, Umbehr had complete discretion over the manner in which he structured his operations, there was little or no oversight by the County, no daily interaction with either the Commissioners or other county employees, and no supervisory relationship with any county official -- all factors that significantly diminish, rather than increase, the government's interest in regulating speech. Pet. Br. at 19-20.[15] Because the factors justifying special limitations on the free speech rights of public employees are not present in this case, the Commissioners must satisfy the rigorous requirements of strict scrutiny by demonstrating a vital interest in regulating respondent's speech. See *Blackburn*, 42 F.3d at 932.

Under this approach, the analysis is straightforward. At no point in this litigation have the Commissioners alleged that termination of respondent's contract based on his critical

[15] The contract between the parties itself specifies that Umbehr was to serve as "an independent contractor and that he, his agents, and employees are not agents or employees of the County or any City." P.A. 108. It also ensured that he would not be viewed by the public as a representative of the County by mandating that his vehicles bear "the name and phone number of the contractor." P.A. 109.

editorial expressions served anything resembling a compelling interest. In fact, they have never suggested that his speech on any of the topics he discussed interfered with his performance under the contract in any way, an acknowledgement that is fatal to any attempt to establish a legitimate, let alone a vital, government interest. The Commissioners, therefore, have failed to meet their obligation under the strict scrutiny formulation and thus respondent's speech is clearly protected from retaliatory action.

2. Even Under *Pickering*, Respondent's Interest In Speaking Would Outweigh The County's Interest In Regulating His Speech

Even if the Court were to conclude that the more restrictive test applicable to public employees should be extended to independent contractors, respondent's speech would still fall comfortably within the First Amendment's protective scope. There is no dispute that the topics on which respondent wrote and spoke out, ranging from the right of county residents to obtain open access to their government to the mismanagement of taxpayer resources, constitute the type of core political speech that is deserving of the utmost protection.[16]

[16] The only subject of respondent's columns that the Commissioners even suggest is not a matter of public interest is the county landfill. Pet. Br. at 32. Yet it is apparent from the record that this issue, which is unrelated to the solid waste collection contract, was more than a dispute about conditions of employment. When the County was considering closing the landfill altogether, respondent joined others in voicing concern about the potential adverse effects on the environment, including an increase in illegal roadside dumping, if a convenient landfill were not

(continued...)

This conclusion becomes all the more apparent when respondent's criticisms of the county government are compared to the types of speech this Court has found protected in the public employment context. See, *e.g.*, *Rankin*, 483 U.S. at 387-89 (statement by law enforcement employee expressing abstract hope that future assassination attempts against President will be successful); *Givhan*, 439 U.S. at 413 (privately expressed complaint about school policies by teacher); *Mt. Healthy*, 429 U.S. at 282 (criticism by teacher of newly enacted dress code); *Perry*, 408 U.S. at 595 (statements by professor critical of university policy); *Pickering*, 391 U.S. at 566 (complaint by teacher about school board fundraising practices and criticism of board's allocation of resources).[17] Placed in this context, the expression at issue in this case is especially deserving of protection, not

[16](...continued)
available. P.A. 57. With regard to the dramatic increases in user fees effected by the Commissioners, respondent's articles largely reflected his belief that the Commissioners were abusing their powers of office by using landfill rates as a method of retaliation. P.A. 79, 84. Moreover, these issues had obvious repercussions for all members of the community and in each instance the elected representatives of the cities requested public meetings with the County Commission. P.A. 57, 84. And finally, contrary to the Commissioners' representations, respondent had little personal interest in landfill user rates because his contract specifically permitted him to pass any increase on to his customers. P.A. 107 (defining unanticipated events to include increased landfill rates). These comments, therefore, both in terms of content and the context in which they occurred, can hardly be viewed as mere "workplace grievances."

[17] These decisions, each of which involve criticism of a nominal supervisor, effectively rebut the Commissioners' suggestion that were he an employee, respondent "could have been fired for insubordination . . . despite the public interest in the issues at stake." Pet. Br. at 22.

only because it took place in the quintessential First Amendment forum, a local newspaper, but because it provided information and ideas to residents of the county on a wide array of government policies -- precisely the type of speech that is essential for the democratic process to function efficiently.

Conversely, the government's interest in regulating respondent's speech in this case is virtually non-existent both because the topics he addressed were unrelated to the contractual agreement itself and because the speech did not interfere with performance. First, one of the principal reasons that this Court has applied a more restrictive balancing test in its employment cases is the fact that the speech at issue involved matters closely connected to the employment relationship. *NTEU*, 115 S. Ct. at 1013 n.11 (noting that virtually all of the Court's employment cases involve speech related to the workplace). The topical relation of the speech to the duties an individual performs creates an increased risk of interference with the government's legitimate interest as an employer in regulating the office environment. In this case in contrast, there is no nexus between the comments made by respondent and the contractual relationship between the parties. Accordingly, premising the decision to terminate respondent's trash collection contract on speech that bears no connection to the relationship cannot plausibly advance any legitimate government interest. *Id.* at 1012, 1015 (honoraria ban imposed on federal employees restricted speech that was both unrelated to the employment relationship and unlikely to interfere with office efficiency).

Additionally, regardless of the subject matter, the Commissioners have never suggested that Umbehr's speech caused any interference with performance under the

agreement. Because the only conceivable government interest in this context, as in the employment area, is in ensuring proper performance of government services, this fact alone is decisive. *NTEU*, 115 S. Ct. at 1012-15 (speech was unrelated to duties and did not adversely impact workplace); *Rankin*, 483 U.S. at 388 ("no evidence that [speech] interfered with the efficient functioning of the office"); *Pickering*, 391 U.S. at 572 (speech did not impede "proper performance of his duties"); *Wood*, 370 U.S. at 394 ("no indication that the publications interfered with his duties").[18] Rather than advancing legitimate government interests, termination of the contract served as a convenient vehicle to punish respondent's criticism of the Commissioners' policies -- a result that is completely at odds with fundamental First Amendment principles. Just as "[v]igilance is necessary to ensure that public employers do not use their authority over employees to silence discourse, not because it hampers public functions, but because superiors disagree with the content of the employees' speech," so too must this Court ensure that government officials do not use their contractual relationships as a mechanism for curbing speech they find offensive. *Rankin*, 483 U.S. at 384.

[18] Even with regard to the county landfill, the one subject that is, at best, tangentially related to the solid waste collection contract, the Commissioners do not contend that performance under the collection agreement was impaired by respondent's critical articles on this issue. As a consequence, termination of the contract based on respondent's criticism of the landfill policies would have been unrelated to the county's interest in "the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568.

II. Petitioners Have Failed To Articulate Any Coherent Theory For Either Eliminating Or Severely Restricting The First Amendment Rights Of Independent Contractors

The Commissioners appear to advance three principal arguments in support of their assertion that independent contractors enjoy little or no First Amendment protection. First, they contend that due to the nature of the independent contractor relationship, local officials must be free of any constraints, including constitutional limitations, on the ability to control their contractual agreements. Second, they maintain that the Tenth Amendment reserves decisions about government contracting to state and local officials. And third, assuming some level of First Amendment protection, they contend that allegations of retaliation by independent contractors should be analyzed under the test applied to content-neutral regulations having only incidental effects on speech. None of these contentions warrants either withdrawing or limiting the First Amendment rights of independent contractors.

A. Local Officials Neither Need Nor Possess Authority To Abrogate Constitutional Guarantees To Exercise Appropriate Control Over Their Contractual Relationships

The Commissioners maintain that, in contrast to the daily interaction and oversight involved in the employee-employer relationship, government officials have a diminished ability to monitor and direct the activities of independent contractors. Based on this distinction, they insist that the right

of termination takes on added importance in this context. Pet. Br. at 17-23. Because, in their view, termination is the only method of ensuring proper performance, they insist that "the right of control must include the power to revoke such a delegation with impunity." *Id.* at 9.

The Commissioners' extended analysis of the differences between independent contractors and employees misses the point of the First Amendment inquiry entirely. Pet. Br. at 17-23. Although the discussion confirms that government officials generally have less managerial control over independent contractors, it fails to explain how the speech of independent contractors on matters of public concern interferes with the government's ability to deliver needed services or why government officials must be free to consider such speech to exercise appropriate control over their contractual relationships. See *NTEU*, 115 S. Ct. at 1013; *Waters*, 114 S. Ct. at 1887 (government generally must make substantial showing that speech will be disruptive).

Nor do the Commissioners even attempt to demonstrate that the nature of the relationship mandates greater discretion to consider expressive activity. Instead, they maintain that only a broad prohibition on all claims of retaliation will provide sufficient protection for the discretionary authority of local governments and their officials. Pet. Br. at 17. According to the Commissioners, therefore, even suits involving demonstrable instances of official retaliation against speech should be precluded to protect government officials from insubstantial claims.

This extraordinary assertion -- that core First Amendment values should be sacrificed to a rule of administrative expediency -- finds no support in this Court's precedents. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)

(state's speculative assertions about potential abuse insufficient to justify First Amendment infringement). On the contrary, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted). Indeed, this Court's First Amendment jurisprudence is premised, in all but a handful of cases, on conducting a carefully calibrated balance between the interests of the individual in speaking and the government's interest in curtailing speech. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (resolution of First Amendment issues "always involves a balancing by the courts of the competing public and private interests at stake"); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971) (First Amendment issues are resolved "through case-by-case adjudications"). Yet, under the peculiar calculus of interests advanced by the Commissioners, government officials may take adverse action against independent contractors based on their expressive activity without demonstrating *any* corresponding interest in restricting speech.[19]

More generally, the contention that government officials must have authority to revoke contractual agreements for any reason, including an individual's exercise of fundamental freedoms, not only adopts a remedy that is

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[19] The related suggestion that the "courts do not have the resources" to entertain such "petty" claims by independent contractors "even if the Constitution permitted it" knows no parallel in this Court's history. Pet. Br. at 30. In effect, the Commissioners contend that the judiciary has discretion to nullify constitutional protections because there may be too many individuals whose rights have been violated, a proposition this Court has never countenanced. Cf. *Rutan*, 497 U.S. at 75 & n.8.

grossly out of proportion to the perceived harm, but it is "at war with the deeper traditions of democracy embodied in the First Amendment." *Elrod*, 427 U.S. at 357 (citation omitted). The *per se* rule the Commissioners propose would create a series of jurisprudential anomalies. Most notably, it places the speech of independent contractors, even on issues central to the democratic process, into one of the "narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" -- on par with obscenity and communications likely to incite imminent lawlessness. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). See also *Roth v. United States*, 354 U.S. 476, 485 (1957); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Commissioners' formulation also would invert the well-established First Amendment hierarchy by protecting independent contractors when they are "hawking [their] wares," while subjecting them to official reprisals when participating in core First Amendment activities. *Bellotti*, 435 U.S. at 784 n.20 (speech on matters of public concern is entitled to greater protection than commercial speech).

Perhaps even more troubling is the fact that the rationale underlying the Commissioners' theory does not appear to be limited to the First Amendment context. The need for complete control, which the Commissioners contend is essential to efficient government operations, seemingly would require the forfeiture of other constitutional protections as well. To provide the Commissioners with the unfettered discretion they demand and to ensure that local officials are not "blackmailed" by threats of meritless litigation, the Court would be forced to shield local officials from allegations of discrimination on the basis of race, sex, religion, or national origin. Neither state nor municipal actors, however, have

authority to regulate their contractual relations free from the limitations imposed by the Constitution. See, *e.g.*, *City of Richmond v. Croson Co.*, 488 U.S. 469, 493 (1989).

Despite the Commissioners' protestations to the contrary, responsible government officials can exercise appropriate control over the provision of needed services without a right to retaliate against speech or to transgress other basic freedoms. Government officials retain the discretion to terminate contractors for any legitimate programmatic reason, including failure to perform, or for no reason at all. *Rankin*, 483 U.S. at 383; *Mt. Healthy*, 429 U.S. at 283. They have no authority, however, to allocate resources based on the consideration of factors the Constitution proscribes. *Id.*

B. The Tenth Amendment Does Not Authorize The Violation Of Other Constitutional Provisions

Petitioners next advance the novel contention that any limitation on elected officials' discretionary authority would result "in a wholesale transfer of power from elected representatives . . . to the courts" in derogation of the Tenth Amendment's reservation of power to the states. Pet. Br. at 23-26. Petitioners have never, in the district court, the Tenth Circuit, or in their Petition, even made reference to the Tenth Amendment. Accordingly, the contention has been waived. *Caspari v. Bohlen*, 114 S. Ct. 948, 952 (1994) (Court will only address questions raised in the petition); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) (arguments not raised below will not be considered).

The procedural bar aside, the argument is easily dismissed. The Tenth Amendment, by its very terms, poses no obstacle to First Amendment review of state action:

> The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X (emphasis added). Because the First and Fourteenth Amendments prohibit the states from abridging the freedom of speech, the Tenth Amendment raises no bar to First Amendment claims. See *Gitlow v. New York*, 260 U.S. 652 (1925).[20]

The Commissioners' attempt to invoke legislative immunity similarly is unavailing. Pet. Br. at 25. First, the Court of Appeals held that legislative immunity is a defense only to individual liability claims, not to the claims registered against individuals in their official capacities. J.A. 38. Petitioners did not seek review of that conclusion in their Petition for Certiorari and thus the issue has been forfeited. *Waters*, 114 S. Ct. at 1891. Second, apart from the failure to raise this issue in the Petition, the executive act of terminating respondent's contract cannot plausibly be viewed as legislative

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[20] A separate strand of the same general thesis suggests that "judicial interference" with the decisions of elected representatives is inappropriate. Pet. Br. at 24-25. "The Fourteenth Amendment, as now applied to the States," however, "protects the citizen against the State itself and all of its creatures -- Boards of [County Commissioners] not excepted." *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943); *Wood*, 370 U.S. at 386 (courts retain power to set parameters of state power regarding freedom of speech).

in nature and thus concepts of legislative immunity are inapplicable. Third, the court of appeals correctly concluded that even if legislative immunity were applicable it would preclude only claims asserted against the Commissioners in their individual capacities. See *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (government may not rely on individual capacity defenses); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

C. Viewpoint-Based Retaliation Cannot Be Characterized As An Incidental Restriction On Speech

Arguing in the alternative, the Commissioners contend that, if applicable, *Pickering* "must be reformulated and redescribed to fit the circumstances of an independent contractor." Pet. Br. at 26. Without offering any rationale, petitioners contend that a claim of intentional discrimination based on disapproval of the speaker's message should be subject to the same level of scrutiny applied to neutral regulations that have only incidental restraining effects on speech. *Id.* The type of view-point based discrimination at issue in this case, however, is subject to the most exacting scrutiny, see *supra* at 19, 32, not to "the least stringent test of constitutional limitation." Pet. Br. at 26. Compare *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding regulation designed to control volume of music as content-neutral restriction).

The remainder of the arguments in this section of the Commissioners' brief discuss a series of unrelated points, none of which are relevant to determining the appropriate First Amendment standard for independent contractors. Pet.

Br. at 27-32. The one substantive assertion that emerges from the discussion, however, is the contention that principles of qualified immunity preclude reliance on the Commissioners' motivation in establishing the claim. *Id.* at 29-30. Even aside from the misstatement of the applicable standard,[21] qualified immunity principles can provide no defense to the official capacity claims currently at issue. *Graham*, 473 U.S. at 166-67 (entity may not rely on individual capacity defenses); *Owen*, 445 U.S. at 651.

III. The Commissioners' Assorted Defenses Are Both Procedurally Barred And Inapplicable

In their final series of contentions, the Commissioners ask the Court to address a virtual laundry list of defenses that have never been raised previously and that in any event are inapplicable to this case.

1. *The alleged default for non-payment of landfill rates provides no defense.* In a theme they attempt to establish from the outset of their brief, the Commissioners contend that respondent was in default under the terms of the solid waste collection contract based on his refusal to pay the new landfill rates during the pendency of his state court challenge. Pet. Br. at 33. They maintain that this fact limits the availability of damages under *McKennon v. Nashville Banner Pub. Co.*,

[21] Motivation is not irrelevant, even in individual capacity claims, where intent is an element of the claim. "Every circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation." *Tompkins v. Vickers*, 26 F.3d 603, 607-08 (5th Cir. 1994).

115 S. Ct. 879, 886 (1995), an age discrimination case in which the defendant uncovered information after termination that provided an alternative ground for the adverse action.

First, petitioners have never raised this issue in the litigation to date and thus may not present the defense at this juncture. *EEOC v. FLRA*, 476 U.S. at 24. Second, *McKennon* dealt only with *after-acquired* evidence "which would support a lawful termination for cause." Pet. Br. at 33. In this case, Umbehr brought suit challenging the landfill rates on June 1, 1990, D.A. 178, and as of January 28, 1991, the date the contract was cancelled, had been in what the Commissioners now describe as "default" for nearly eight months. Although the Commissioners were fully aware of the relevant facts, "this cause was not expressly invoked at the time." Pet. Br. at 33. Third, even if there had been a default, it would not provide an alternative ground for termination because the Commissioners themselves failed to comply with the terms of the contract. The relevant provision in the agreement required "written notice stating in detail a description of the facts constituting the breach" and a thirty-day opportunity to cure, P.A. 108, neither of which the Commissioners provided.

2. *The Commissioners have never alleged they had "mixed motives" for terminating the contract.* While *Mt. Healthy*, 429 U.S. at 287, provides a constitutional standard of causation that applies equally to claims of retaliation by employees and independent contractors, the Commissioners did not present a mixed motive defense in either the district court or the court of appeals, nor do they make any effort in this Court to demonstrate its application. Accordingly, this argument is not properly presented both because it was not

preserved below, *EEOC v. FLRA*, 476 U.S. at 24, and because the question is not implicated in this case.

3. *The Commissioners have never alleged respondent is a "policy maker."* Without contending that respondent is in a policy-making position or that this case involves patronage practices, the Commissioners suggest that the Court should make clear that an "independent contractor whose responsibilities include the formulation of policy should be [] terminable without cause." Pet. Br. at 34. Given that this issue is neither implicated in this case, and thus presents no Article III case or controversy, nor has been argued below, the Court has no occasion to render an opinion on this question. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) ("courts are not roving commissions assigned to pass judgment on the validity of" abstract questions).

4. *The Commissioners did not rely on an erroneous understanding of respondent's speech.* The Commissioners next misapply this Court's holding in *Waters v. Churchill*, 114 S. Ct. 1878 (1994), by contending that it insulates government officials from liability if they "reasonably believed on the facts available that no First Amendment issue was presented." Pet. Br. at 34. They argue that, because they were granted qualified immunity in their individual capacities, they are, under *Waters*, likewise immune from suit in their official capacities.

First, the Commissioners did not raise this contention below and thus it has been waived. Second, the plurality in *Waters* did not purport to shield government entities from liability for good faith, but erroneous understandings of the *law*. Rather, it concluded that good faith, but erroneous understandings of the *facts* may provide a defense where "what the government employer thought was said" would not

be protected by the First Amendment. *Waters*, 114 S. Ct. at 1882. Suffice it to say, the Commissioners have never alleged that they misunderstood the import of respondent's criticisms and terminated the contract "based on substantively incorrect information." *Id.* at 1890.

In any event, individuals may not bootstrap a finding of qualified immunity into a defense against official capacity claims. *Owen*, 445 U.S. at 651 & n.33; Rodney A. Smolla, *Federal Civil Rights Acts* 14-55 (3d ed. 1995). As a result, the fact that the Commissioners escaped personal liability has no effect on the ultimate obligation of the County to redress the constitutional wrongs committed. *Id.* at 657-58. See also *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1162 (1993).

5. *There is no obligation to exhaust state judicial remedies prior to pursuing a federal constitutional claim under section 1983.* The Commissioners final contention is that respondent's action is foreclosed because he "chose to file a federal civil rights action in U.S. District Court rather than seeking any relief by way of appeal to the Kansas State Courts." Pet. Br. at 34-35. Again, this assertion was presented in neither the district court nor the court of appeals and thus has been waived. Moreover, decisions of this Court extending back over three decades have rejected this precise contention. "It is no answer that the State has a law which if enforced would give relief. The federal remedy [under section 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961). See also *Heck v. Humphrey*, 114 S. Ct. 2364, 2370 (1994); *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S.

418, 429 (1987); *Board of Regents v. Tomanio*, 446 U.S. 478, 491 (1980).

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit should be affirmed. Further, because the Commissioners, regardless of the test applied, can demonstrate no interest in premising their decision to terminate respondent's contract on his speech, the case should be remanded solely for a factual determination concerning the Commissioners' actual motivation for the challenged action.

Respectfully submitted,

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October 5, 1995

(8)

No. 94-1654

In The

Supreme Court of the United States

October Term, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

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RESPONSE TO STATEMENT OF FACTS

Respondent's Statement of Facts is filled with numerous matters which are entirely irrelevant to the claims made by him in this lawsuit. The sole action which respondent has ever alleged as a legal basis for the violation of his First Amendment rights was the vote to terminate his contract in 1991. All of the other activities described in respondent's brief, from disputes over access to public records to the raising of landfill rates, have never been alleged as violations of his First Amendment rights. The Kansas Supreme Court expressly noted in the parallel litigation in which respondent attempted to roll back a landfill rate hike that there had never been any allegation that the rate hike was enacted in violation of Mr. Umbehr's First Amendment rights.

Respondent does not deny that all of his activities were performed in pursuit of his quest for personal political power, as a candidate for office as a county commissioner. He has not denied that all of his public comments ceased as soon as he lost the election. He does not contend that he was motivated by any purpose other than a desire for personal political power and economic gain.

Although he recognizes the clear conflict of interest inherent in having the operator of a lucrative contract with the county become a member of the county commissioners, citing a statute which would prohibit him from voting on the renewal of his contract had he been elected, he acknowledges no legal limit on his right to exercise the powers of the office he sought for the purpose of reversing the landfill rate hike or maintaining the availability of the county landfill for the dumping of refuse collected by

him, even if the decision to do so would have been detrimental to the county.

Respondent refers to no evidence that the decision to terminate his contract was in any way motivated by a desire to silence his publications or was determined by the viewpoint expressed by him. To the contrary, he quotes the testimony of one commissioner whose motivation was to move Umbehr to another forum where the county commission would not be compelled to listen to him. Clearly the disruptive effect of Umbehr's activities was substantial, and his methods materially interfered with the functions of the board and caused near breaches of the peace in commission meetings. All of the events cited by respondent in support of his claim to the protection of the First Amendment really show instead that he was no more than a personal foe of the members of the commission, who attempted to monopolize the time and resources of the county commission to listen to his personal complaints in derogation of the rights of other members of the public to be heard.

Respondent's suggestion that the need to free the county from the existing contract to permit consideration of new financing options and, if necessary, to permit the closure of the landfill was merely pretextual is seriously misleading. Although not reflected in the record because the motions which decided the case were filed four years ago, the county landfill has in fact since been closed, an event which would have been legally wrongful had Mr. Umbehr's contract not been terminated.

The arguments presented by respondent presume, without discussion or analysis, that any action taken

against his wishes must be considered a legal wrong, giving rise to a cause of action under 42 U.S.C. § 1983. The cases relied upon by respondent involve actions which disadvantaged persons who had engaged in First Amendment protected activities, in comparison to others who had not engaged in such activities. No such circumstance is present here. The termination of Mr. Umbehr's contract left him in exactly the same position as any other member of the general public who had never made any public comment offensive to Petitioners. He did not even suffer any monetary loss that appears in the record, since he was able to increase the rates charged five of the six cities which he had previously serviced once the contract had been terminated. There is no evidence that any person was favored over him in any dealings with the county. There is no suggestion that the County Commission in any way discriminated against him on the basis of the viewpoint expressed in his various public appearances. This fact distinguishes the present case from the authorities cited on pages 21-24 of respondent's brief.

Respondent's arguments at pages 28-32 of his brief also avoid addressing the merits of the issue presented to the court here. Whether governmental agencies do or do not have a higher or lower interest in regulating the content of the speech of independent contractors than they have in regulating the content of the speech of employees has no bearing on the relative significance of the governmental agency's right to control its own operations. This case involves no attempt to regulate the content of anyone's speech, whether that person is viewed as an employee or an independent contractor. If anything, respondent, not petitioners, is seeking to regulate speech,

by punishing petitioners for their personal comments in response to his offensive accusations against them. This case confronts the court not with a contention that independent contractors should not have as much freedom as governmental employees from regulation of the content of their speech, but with the more basic question of whether they have the right to seize control of the functions of government by making utterances that are seriously disruptive of governmental operations and threatening suit if their demands for economic advantage are not met.

ARGUMENT AND AUTHORITIES

I. RESPONDENT HAS PRESENTED NO JUSTIFICATION FOR EXTENDING CONSTITUTIONAL PROTECTION TO HIS TRASH HAULING CONTRACT.

Respondent's brief omits all reference to a key element of the test of *Pickering v. Bd. of Education of Township High School District*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), requiring the court to consider not only the effect of a public servant's activities on his or her own work, but also the effect of the speech activities on the efficient functioning of the operations of the governmental employer as a whole. *Pickering* acknowledged the relevance of any possible disruption of the activities of others, and not just interference with the speaker's own activities, without articulating how that consideration might be applied. See, 391 U.S. at page 573. This principle was described in greater detail and applied in *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983). In *Connick* the court expressly concluded that the plaintiff

employee's activities were protected by the First Amendment and did not impede her own ability to perform her responsibilities. Despite these considerations the plaintiff's firing was deemed to be constitutionally permissible as a matter of law because her activities threatened to disrupt the work of co-employees. The supervising personnel testified that they considered the employee's conduct to be "an act of insubordination which interfered with working relationships." See 461 U.S. at 151, fn. 11. The *Connick* opinion went on to state that the Constitution did not require an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. See 461 U.S. at 152, fn. 12. In reaching this conclusion, the court relied in part on the separate opinion of Justice Powell in *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974), quoting the following comments:

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

See 461 U.S. at 151.

Respondent's brief nowhere addresses this aspect of the law, preferring instead to focus exclusively on the lack of any proven interference of Mr. Umbehr's First

Amendment activities with his own operations. The lack of discussion of the rule of *Connick* is obviously a result of respondent's complete inability to justify his claims under that rule of law. The recitation of facts appearing in respondent's brief clearly indicates a chronically disruptive attitude by him. His activities induced the Board to take steps which were detrimental to its functioning, including scheduling potentially unlawful closed meetings. Mr. Umbehr's disruption was so severe that he generated obvious antagonism with board members, as is evidenced by the exchange of harsh language quoted in respondent's brief. The discovery record also revealed that Mr. Umbehr's activities so irritated one key county employee that he resigned his employment. Plainly, if Mr. Umbehr had been an employee he could have been fired with full constitutional justification under the test of *Connick v. Myers, supra.* The termination of Mr. Umbehr's contract served the same purpose that firing him as an employee would have served. It turned him into just another member of the general public, with no greater access to information about county operations than others and no special claim to the time or attention of the Board of County Commissioners.

There is no reason why the constitutional interest of the people and their elected representatives in the efficient operation of governmental functions should be ignored when the person who seeks to usurp public functions to himself and interfere with the smooth operation of governmental business is not a common law employee. Mr. Umbehr's activities were especially intrusive upon the smooth functioning of local government because he had a contractual right to demand that the

county landfill be kept open for his use, and because that fact gave him an excuse to monopolize time at the county commission meetings. By terminating the contract the county commissioners gained relief from Mr. Umbehr's unwarranted intrusions into their deliberations.

The contention of respondent that local government may not take action contrary to his economic interests in response to statements made by him in the course of a political campaign are squarely refuted by this court's decision in the case of *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). In that case a state statute which prohibited government employees even from becoming a candidate for public office was affirmed under a test of strict scrutiny. Respondent has repeatedly sought to analogize his status as an independent contractor with the status of government employees.

If the State of Kansas and its subdivisions can require the termination of any public employee who decides to run for political office, it can also certainly allow the termination of any independent contractor performing public services who elects to become a candidate for political office. In fact, Kansas has elected to prohibit public servants from taking office as county commissioners. See Kansas Statutes Annotated 19-205, which states in pertinent part that no person holding any state, county, township or city office shall be eligible to the office of county commissioner in any county. All of Mr. Umbehr's comments were made during the course of his political campaign for the office of county commissioner.

Because the First Amendment would permit a *per se* rule requiring termination of his public servant position

if he became a political candidate at any level, it certainly will tolerate his termination for seeking an office where he would have clear and direct conflict of interest. Respondent admits at page 10 of his brief that had he won election to the commission, he would have had a sufficient conflict of interest to be required to abstain from voting on any issue pertaining to trash collection. The Constitution does not limit the county's remedies for such a conflict of interest to an admonition to abstain from voting on legal action against him, once he has cast a prohibited vote. The county is permitted to require that the conflict of interest never arise, by mandating a termination of the relationship before the public servant is even elected to office.

II. THERE IS NO RATIONAL BASIS FOR GIVING A GOVERNMENTAL AGENCY LESS DISCRETION TO TERMINATE A CONTRACTOR THAN IT HAS TO TERMINATE AN EMPLOYEE.

The legitimate right of governments to control their own operations as articulated in *Pickering v. Bd. of Education of Township High School District*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), cannot rationally be limited only to those persons who qualify as civil servants or who have a common law contract of employment qualifying them as servants for whose actions the employer is legally responsible. It is the activity performed by the person against whom sanctions have been imposed, not their contractual status, which creates the right of control. Similarly it is the degree of interference with governmental operations, not the performance of the contract of employment or the public nature of the

speech involved, which makes it appropriate for the government to take action in response to speech.

Governmental agencies have a peculiar relationship with contractors to whom they delegate portions of their responsibility to afford services to the general public. The government may have only limited rights to control the activities of individual employees of a governmental contractor, for example, *see, Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961). Neither the independent contractor nor its employees will be treated as servants, whose wrongful acts impose liability on the governmental principal, even if the contractor works exclusively for the government and earns no outside income. *See, Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L.Ed.2d 418, 102 S.Ct. 2764 (1982). Because government contractors may be performing essential services in behalf of the government, however, they will not be treated the same as private businesses supplying services on the open market, and may appropriately be granted immunity from civil liability for acts performed in furtherance of the government's business *See, Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442,108 S.Ct. 2510 (1988). Just last term this Court held that the use of an independent contractor to supply printing services for the benefit of a religious organization was constitutionally indistinguishable from the use of governmental employees for the same purpose. In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, ___ U.S. ___, 132 L.Ed.2d 700, 115 S.Ct. 2510 (1995), a majority of the court held that independent printing contractors who were paid governmental funds for the preparation of religious

publications could be treated the same as governmental employees, rather than being treated as agents of the religious organization, for the purpose of applying the Establishment Clause of the First Amendment. This Court has also held that independent contractors could be treated the same as governmental employees in analyzing the scope of protections afforded persons who invoke their rights under the Fifth Amendment. *See, Lefkowitz v. Turley*, 414 U.S. 70, 38 L.Ed.2d 274, 94 S.Ct. 316 (1973), and *Lefkowitz v. Cunningham*, 431 U.S. 801, 53 L.Ed.2d 1, 97 S.Ct. 2132 (1977)

There is no public interest to be served in granting special privileges to governmental contractors. Independent contractors bargain for their economic rights, and serve the public interest only as long as their services are needed. When the benefits provided by the contractor are outweighed by the burdens perceived by the people and their elected representatives, the contract should be terminated. No contractor should be allowed to rewrite the terms of an agreement which expressly gives the people the right to exercise unfettered discretion in deciding when the burdens of continuing the relationship are too great. Any suggestion that the people's opinion should be ignored must be based on the private interests of the contractors and those who derive economic benefit from them, rather than the public interest. If the public interest requires an assurance of continuity in the relationship, contractual guarantees against termination can be negotiated openly and fairly. There is no need for judicial imposition of tenure rights which are not the result of an honest agreement between the parties to the contract. Politicians may have an interest in protecting the rights of

contractors who make campaign contributions, but this interest is not the public interest. The contracts of campaign contributors are no more deserving of protection than any other political appointment handed out as spoils by politicians.

III. RESPONDENT HAS MISAPPREHENDED BASIC PRINCIPLES OF THE LAW OF LEGISLATIVE IMMUNITY AND CIVIL RIGHTS

Respondent's brief suggests that legislative immunity would not prevent recovery against an employer, but would only protect individual actors from personal judgments. Respondent also suggests that a federal civil rights remedy should be available even if an adequate state court remedy already exists, because the doctrine of exhaustion of administrative remedy does not apply to civil rights actions. Respondent has misconstrued the law on both of these issues.

The doctrine of legislative immunity is broader than the doctrine of qualified immunity. Legislative immunity prevents the recovery of damages not only from individual actors, but also from the governmental entity itself. See, for example, *Fry v. Board of County Commissioners of Baca Co.*, 7 F.3d 936 (10th Cir. 1993); *Lake Country Estates, Inc v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951). The opinion of the Tenth Circuit Court of Appeals in this matter did not hold otherwise, contrary to the comments in Respondent's brief at pp. 44-45. The Tenth Circuit did not rule that legislative immunity either did not apply or would be unavailing against official capacity claims. Instead, its

opinion stated that the applicability of legislative immunity was a "close question", lending credence to the application of qualified immunity to the claims against petitioners in their individual capacities.

This court has long recognized that federal courts should not interfere with the operations of state government where there is an adequate remedy under state law, and that relief under 42 U.S.C. § 1983 is not available where the adequacy of the remedy available in state court renders that relief unnecessary. See, for example, *National Private Truck Council, Inc. v. Okla. Tax Com'n*, ___ U.S. ___, 132 L.Ed.2d 509, 115 S.Ct. 2351 (1995); *Albright v. Oliver*, ___ U.S. ___, 127 L.Ed.2d 114, 114 S.Ct. 807 (1994); *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1980). General principles of judicial comity also require federal courts to respect the integrity and function of local governmental institutions which are ready, willing and able to remedy any deprivation of constitutional rights. *See, Missouri v. Jenkins*, 495 U.S. 33, 109 L.Ed. 2d 31, 110 S.Ct. 1651 (1990); *Bush v. Lucas*, 462 U.S. 367, 76 L.Ed.2d 648, 103 S.Ct. 2404 (1983). The adequacy of state law remedies clearly is relevant in determining whether a remedy will be made available under 42 U.S.C. § 1983, which is the statutory provision invoked by the plaintiff in this case. *See, Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990); *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984). The adequacy of remedies available under the laws of Kansas in its own courts would become irrelevant only if Mr. Umbehr could show that he was a victim of an established procedure, rather than a single instance of personally motivated retaliatory conduct. *See, Logan v.*

Zimmerman Bruch Co., 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982).

Petitioners are not asking this court to deprive any plaintiff of a federal remedy where a content-based prior restriction of the rights of independent contractors is adopted as a matter of policy. Because we are dealing here only with a post-speech retaliatory sanction imposed by individuals allegedly for their personal gratification rather than pursuant to any governmental policy, the rule of *Parratt* would plainly apply to prevent any remedy under § 1983 so long as an adequate remedy is available in Kansas courts. Respondent apparently does not deny that a fully adequate remedy is available under Kansas law, as established in his own parallel lawsuit reported as *Umbehr v. Board of Wabaunsee County Com'rs*, 843 P.2d 176, 252 Kan. 30 (1992).

CONCLUSION

For the foregoing reasons, petitioners adopt the conclusions stated in their initial brief.

Respectfully submitted,

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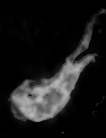

QUESTIONS PRESENTED

1. Whether the First Amendment protects government contractors from contract termination or other adverse contract action based on their publicly expressed viewpoints.

2. Whether *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), governing the First Amendment rights of government employees, is applicable to government contractors.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1654

GLEN HEISER AND GEORGE SPENCER, PETITIONERS

v.

KEEN A. UMBEHR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the extent to which the First Amendment restricts the ability of government to rely upon a person's publicly expressed viewpoints in making decisions relating to contracting with that person. The United States has a substantial interest in the preservation of constitutional rights of free expression. As the nation's largest single public purchaser of goods, services and property, the United States also has a substantial interest in the constitutional standards governing the circumstances in which government may take speech into account in its contracting determinations.

STATEMENT

Respondent, Keen A. Umbehr, the operator of a trash hauling business, sued petitioners Glen Heiser and George Spencer, members of the Board of the Wabaunsee (Kansas) County Commission, alleging that they violated the First Amendment by terminating his trash hauling contract with the county in retaliation for his criticisms of county government at public meetings, and in letters and columns in local newspapers. J.A. 21-24. The district court held that the First Amendment does not protect government contractors from termination of their contracts based on their speech. The court of appeals reversed, holding that the First Amendment protects public contractors to the same extent that it protects public employees from adverse action based on speech.[1]

1. Kansas law obligates each county in the State to make a plan for solid waste disposal, and the contract at issue was developed pursuant to the county's waste disposal plan. Respondent is an independent contractor doing business as Solid Waste Systems. In 1981, respondent bid on and was awarded the county trash collection contract, and the parties revised and renewed the contract in 1985. The contract gave each of the seven towns in the county the opportunity, by ratifying the contract, to use respondent as its exclusive residential trash hauling service at a specified per-residence price. Any town that elected not to ratify the contract remained responsible for its own trash collection, and each ratifying

[1] The district court's decision was rendered in response to petitioners' motion for summary judgment. The court was therefore required to view the evidence and all justifiable inferences therefrom in the light most favorable to respondent. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1987). This statement of the facts reflects that procedural posture.

town retained the right to opt out of the contract on 90 days' notice. The contract also gave respondent the right to dispose of the collected waste in the county landfill at a rate established by the county and incorporated in the contract. The contract provided that it was to be automatically renewed annually, unless a party gave 60 days' notice of intent to terminate, or 90 days' notice of intent to renegotiate. J.A. 12-13, 21-24; see also C.A. App. 106-113 (contract).[2]

The contract specified that "[i]t is mutually agreed and understood that the contractor is an independent contractor and that he, his agents, and employees are not agents or employees of the County or any City." C.A. App. 108. The contractor was expected to use his own personnel and equipment, and the contract specified that his vehicles must have "clearly visible on each side the name and phone number of the contractor." *Id.* at 109. The contractor was required to deal with the county's designated solid waste administrator on all issues relating to the contract. *Id.* at 110. Six of the seven towns in the county ratified the contract, and respondent hauled trash for them for approximately ten years. J.A. 21-22.

During 1989, respondent was increasingly outspoken in his public criticisms of county government and the Board of County Commissioners.[3] He "spoke out at county commission meetings and wrote letters and columns in local

[2] References to "C.A. App." are to the Appendix to Brief of Appellant in the court of appeals. Appellees filed a separate Appendix in the court of appeals, which is referred to herein as "Appellees' C.A. App."

[3] The opinion of the district court states that respondent spoke out "throughout the 1980s and in 1990," J.A. 13, but the record suggests that respondent publicly expressed his criticisms of the county primarily beginning in 1989.

newspapers about a variety of topics, including landfill user rates, the cost of obtaining county documents from the county, alleged violations by the county commission of the Kansas Open Meetings Act, and a number of alleged improprieties, including mismanagement of taxpayer money, by the county road and bridge department." J.A. 22.

Several of respondent's criticisms appeared in letters to the editors of the local newspapers, or in his newspaper column, "My Perspective," published from February, 1989, through June, 1990. Respondent publicly assailed the county's practices of charging both per-page and hourly labor charges for copying public records, and imposing a three-day waiting period for copies, which he viewed as impediments to citizens' lawful access to public information. C.A. App. 56, 72. He contended that the policy on copies violated the Kansas Open Records Act, Kan. Stat. Ann. (K.S.A.) §§ 45-215 *et seq*. (1993 & Supp. 1994), C.A. App. 73, 77.[4] Respondent also publicly questioned the accuracy of official minutes of meetings of the Board of County Commissioners, *id*. at 66, 70, and accused the Board of having violated the Kansas Open Meetings Act (KOMA), K.S.A. §§ 75-4317 *et seq*. (1989 & Supp. 1994), by repeatedly holding closed-door sessions on controversial issues, C.A. App. 67, 68, 71, 73, 83.[5]

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[4] In response to respondent's allegations, the county attorney concluded that the Board should change its policy. Appellees' C.A. App. 537.

[5] An Attorney General investigation of alleged KOMA violations resulted in a consent decree between the Attorney General and the commissioners in which the commissioners acknowledged that they had violated the Act, agreed to conduct all future meetings in compliance with the Act, and also agreed to conduct a public meeting regarding the requirements of the Act. Appellees' C.A. App. 160-162.

Respondent also argued publicly against closing the county landfill, see C.A. App. 57, 58, 61, 66, and criticized landfill user rate hikes. Although respondent acknowledged a need for increased landfill user rates, *id*. at 120-121, he opposed the size of the proposed increases as unjustified, *id*. at 77, 78, 81, 82, 84, 85, 121.[6] Respondent further asserted that the county road and bridge department misused public resources by, among other things, using county equipment to assist a private construction company on a private job. *Id*. at 60, 61, 62, 64.[7]

Petitioners reacted negatively to respondent's public expression of his views. Petitioner Heiser stated at a May 31, 1989, Board meeting that he found respondent's newspaper articles offensive and suggested they should be "censored," and that the official county newspaper, the Signal-Enterprise, should "take a second look at what is put in the paper, to avoid anyone getting into trouble."

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[6] Respondent challenged the rate increase in state court. The District Court of Wabaunsee County, noting that a commissioner had acknowledged that the calculation of the proposed new rates was "a shot in the dark," held that the commission had not established a proper factual basis for the new rates and granted respondent's request for a temporary injunction. C.A. App. 121. On the merits, the court found that the rate increase was unreasonable and arbitrary. See *Umbehr v. Board of County Comm'rs*, 843 P.2d 176, 178 (Kan. 1992). The Kansas Supreme Court reversed on the ground that the state courts lacked jurisdiction to review the commission's action. *Id*. at 181-182.

[7] The Kansas Attorney General conducted an investigation into alleged misuse of county property and concluded in December, 1989, that the county had "loose administrative practices and accounting procedures," had "not had adequate controls on the disposition of gasoline, oil and other consumable supplies from the county facilities," and failed adequately to document projects undertaken with county equipment that benefit private citizens. The Attorney General also concluded, however, that there was "no misconduct or neglect of duty on the part of any county commissioner." Appellees' C.A. App. 157-159.

C.A. App. 92; see *id.* at 69.[8] Petitioner Spencer said that he would like to see some of respondent's newspaper articles eliminated, *id.* at 88, and that the newspaper's editors should "take out anything that was offensive," *id.* at 90. Spencer stated that he believed that the trash hauling contract gave respondent a "platform" to cause problems for the county because, as Spencer put it, "as long as we had the contract with him that gave him the excuse to come into our meetings." *Id.* at 89.

The Board voted in February, 1990, to terminate respondent's contract. J.A. 23.[9] The vote was legally defective, however, because the resolution mistakenly referred to the defunct 1981 contract instead of the then-current 1985 contract. See Appellees' C.A. App. 164. In January, 1991, the Board voted again and successfully terminated the contract. J.A. 23.

2. Respondent brought suit under 42 U.S.C. 1983 in the United States District Court for the District of Kansas, alleging that the county commissioners' termination of his contract in retaliation for his speech violated the First Amendment. Following discovery, the district court granted petitioners' motion for summary judgment. J.A. 10-20. In light of the evidence submitted at the summary

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[8] The editor of the Signal Enterprise noted in a front-page commentary on June 8, 1989, that he had been threatened at the Board of Commissioner's meeting and "criticized for not screening the articles of Keen A. Umbehr." Appellees' C.A. App. 154.

[9] The minutes of the Board meeting reflect no discussion of the reasons for termination except that "Commissioner Spencer stated that the present agreement with Solid Waste Systems on the County Contract and the contract with the cities indicate a number of officials who are no longer in office and with this in mind, Commissioner Spencer made a motion to open the Solid Waste Contract for bid this year." Appellees' C.A. App. 164.

judgment stage, the court assumed that "[respondent's] comments did motivate the votes in favor of terminating [respondent's] contract with Wabaunsee County." J.A. 14.[10] It determined that, "if [respondent] had been a government employee, he would have been protected from termination in retaliation for his statements." *Ibid.* The court nonetheless concluded that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." *Ibid.* In the court's view, respondent's contractor status was determinative: "[A]s an independent contractor, [respondent] cannot claim that his First Amendment rights were violated by the alleged retaliatory termination of his contract with Wabaunsee County." J.A. 17-18.[11]

3. The court of appeals reversed. J.A. 21-39. The court held that "an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be. Thus, the *Pickering* [v. *Board of Educ.*, 391 U.S. 563 (1968),] balancing test would apply to such a retaliatory action." J.A. 37. The court observed that "in its role as sovereign, the

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[10] See also C.A. App. 24 (joint pretrial order identifying as a material issue in dispute "[w]hether the exercise by plaintiff of his First Amendment rights was a substantial motivating factor in the termination of plaintiff's contract with the Board of County Commissioners.").

[11] Respondent sued the third member of the three-person county commission, Joe McClure, in his individual capacity only. The district court dismissed the individual-capacity claims against each commissioner based on qualified immunity, J.A. 18, and also granted summary judgment for McClure because, unlike Spencer and Heiser, he did not vote in favor of terminating respondent's contract, J.A. 19. The court of appeals affirmed as to McClure on both grounds. J.A. 38. McClure thus is not a party before this Court.

government cannot punish or otherwise burden the speech of citizens criticizing the government, except in very limited circumstances." J.A. 34. When government acts as employer, it "can only punish or burden speech of its employees criticizing the government when it shows that such speech interferes with the government's ability to function." *Ibid.* Permitting government to burden independent contractors' speech without any showing of interference with the government's ability to function would "accord those who contract with the government a lesser degree of First Amendment protection than ordinary citizens enjoy vis-a-vis their government or than government employees enjoy vis-a-vis their employer." *Ibid.* The court rejected that anomalous result.

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, 445 U.S. 507 (1980), and *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990), this Court held that governmental employment decisions made on the basis of political party affiliation are presumptively unconstitutional under the First Amendment. In reaching its decision in this case, the court of appeals noted (J.A. 30-31) that several courts of appeals had viewed those patronage decisions as inapplicable outside the employment context, and had thus upheld patronage contracting practices against First Amendment challenges. *E.g.*, *Horn* v. *Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc); *LaFalce* v. *Houston*, 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984). The court of appeals stated its disagreement with the analysis of those courts in limiting the employee-patronage decisions,[2] and commented that, in any event, decisions

[2] The court of appeals analyzed at length and expressly rejected the two principal rationales upon which the *Horn/LaFalce* line of cases distinguished the patronage-employment decisions in upholding patronage-based contracting. Those courts relied in part on a footnote in *Branti*, 445 U.S. at 513 n.7, specifying that "the only practice at issue" in both *Elrod* and *Branti* was "the dismissal of public employees for partisan reasons," and that the case thus did not involve other patronage practices, including "granting supporters lucrative government contracts." See *Horn*, 796 F.2d at 674; *LaFalce*, 712 F.2d at 294-295. In the court of appeals' view, however, *Rutan* "undermined the rationale of *Horn* and *LaFalce* that relied upon the Supreme Court's reluctance to extend *Elrod* and *Branti*." J.A. 34-35.

The court of appeals was also unpersuaded by the contention that patronage contracting is not subject to constitutional scrutiny because independent contractors "have less at stake" in their public contracts than public employees have in their jobs. J.A. 35; see also J.A. 32. The court "reject[ed] any categorical distinction based on whether independent contractors have more or less of an economic interest in their governmental contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant." J.A. 36.

dealing with patronage employment practices have "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." J.A. 37.

SUMMARY OF ARGUMENT

The decision of the court of appeals should be affirmed based on a straightforward application of this Court's established unconstitutional-conditions doctrine. When a private business is hired to haul trash for a county government, the First Amendment prohibits the government from terminating that contract because the owner of that business criticizes the government at public meetings and publishes newspaper articles critical of the county. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Such speech lies at the heart of First Amendment protection. There is no question that the First Amendment prohibits

viewpoint-based discrimination against an individual because of that person's political expression in public fora such as newspapers and open meetings of government bodies. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

The fact that in this case respondent's expression was not punished directly by a fine or other penalty, but by termination of a public contract that he otherwise would have retained, does not change the result. As the court of appeals correctly recognized, "permitting governments to terminate a public contract because of the contractor's speech" permits them "to accomplish indirectly that which they cannot accomplish directly—punishment of speech that they do not like." J.A. 33-34. A decision to grant or withdraw a public contract because of the publicly expressed viewpoints of the contractor generally should be treated, like a viewpoint-based decision to grant or withdraw any other government benefit, as presumptively unconstitutional. See, *e.g.*, *Rosenberger* v. *Rector*, 115 S. Ct. 2510, 2516-2520 (1995).

The simplicity of this case is obscured by petitioners' and the lower courts' reliance on two inapplicable lines of First Amendment cases—those relating to political patronage, and those recognizing the special prerogatives of government to regulate the speech of public employees. As petitioners acknowledge (Pet. Br. 15), this is not a political patronage case; respondent was terminated because of the critical viewpoint of his public expression, not because of his political party affiliation. Thus, although some circuits have held that there is no First Amendment obstacle to awarding public contracts as a form of political patronage, the district court erred in relying on those cases (J.A. 14-16) to hold that respondent lacked any First Amendment rights against termination

of his contract in retaliation for the public expression of his critical views.

Although the court of appeals was correct in recognizing that respondent is not completely without First Amendment protection, the court of appeals in our view invoked the wrong First Amendment analysis in holding that *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), provides the proper test on remand. Respondent was not a public employee, and the county lacked the authority to regulate his speech to the same extent that it may, under *Pickering*, regulate the speech of government employees. *Pickering* appropriately applies to contractual relationships that involve supervision of contract performance by the government similar to governmental supervision over employee subordinates. Where, as here, however, the kinds of relationships the *Pickering* test aims to protect are absent, that test is inapplicable.

Petitioners have not, moreover, asserted that respondent's speech was not on matters of public concern, or that it interfered with the efficient performance of respondent's contract. Therefore, even if *Pickering* applied, petitioners lacked any valid justification for reacting to respondent's speech by terminating his contract. The sole task for the finder of fact on remand should therefore be to decide whether opposition to respondent's speech did, indeed, motivate petitioners and, if it did, to enter judgment in respondent's favor.

ARGUMENT

I. THE CONSTITUTION PROHIBITS THE COUNTY FROM TERMINATING RESPONDENT'S GOVERNMENT CONTRACT IN RETALIATION FOR HIS SPEECH

The First and Fourteenth Amendments prohibit petitioners from terminating respondent's public contract in retaliation for his public statements critical of the county and its Board of Commissioners. It is firmly established that government may not withdraw a benefit because the recipient expresses viewpoints objectionable to government officials.[13] Denying government contracts based on the viewpoint of contractors' public expression "is in effect to penalize them for such speech. Its deterrent effect is the same as if the [government] were to fine them for such speech." *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). Last Term in *Rosenberger* v. *Rector*, 115 S. Ct. 2510 (1995), this Court reaffirmed the basic principle that government benefits cannot constitutionally be conditioned on the views expressed by the recipient in exercising the right of free speech. *Rosenberger* invalidated under the Speech Clause the University of Virginia's refusal to authorize payments from the University's Student Activities Fund to support a student newspaper containing particular views. The Court accepted, as "compelled" by its own precedents, the University's acknowledgement that "[i]deologically driven attempts to

[13] See, *e.g.*, *Rosenberger* v. *Rector*, 115 S. Ct. 2510, 2516-2520 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147 (1993); *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 227-231 (1987); *FCC* v. *League of Women Voters*, 468 U.S. 364, 399-401 (1984); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958).

suppress a particular viewpoint are presumptively unconstitutional in funding, as in other contexts." *Id.* at 2517. Petitioners' assertion (Pet. Br. 28) that "a retaliatory motive engendered by harsh political debate" is a constitutionally permissible basis upon which to terminate a public contract is flatly contradicted by the settled prohibition on unconstitutional viewpoint-based conditions.[14]

Petitioners emphasize that the trash hauling contract was terminable at will, Pet. Br. i, 11, but such a contract nonetheless cannot be terminated for unconstitutional reasons:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Perry, 408 U.S. at 597. Respondent's lack of a "right" to the trash hauling contract "is immaterial to his free speech claim." *Id.* at 598.

The Constitution does not, of course, place a person who engages in public protest or criticism in a better position than one who remains silent. Petitioners' principal contention is that application of the First Amendment in

[14] There are circumstances, not present in this case, in which the content of speech may constitutionally be considered in decisions regarding allocation of government funds. For example, this Court has "permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 115 S. Ct. at 2518-2519.

this case would "tie the hands of responsible government officials," Pet. Br. 12, and "prevent the cancellation of * * * contracts so long as [the contractors] publicly criticize the public officials who control the decision to cancel or not," *id.* at 17. It has been long established, however, that no such consequences flow from recognition that government benefits cannot be conditioned on the surrender of First Amendment rights. This Court held nearly two decades ago, in *Mt. Healthy* v. *Doyle*, 429 U.S. 274 (1977), that a public employee who has exercised constitutional rights should be left "in no worse a position than if he had not engaged in the conduct," but also "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of the decision." *Id.* at 285-286. Accordingly, if respondent shows on remand that his speech was a "motivating factor" in the Board's decision not to renew the contract, the Board will have the opportunity to prove "that it would have reached the same decision as to respondent's [contract] even in the absence of the protected conduct." *Id.* at 287.

Contrary to petitioners' contention, this case does not concern "decisions which are content neutral and which only incidentally burden speech." Pet. Br. 16; see *id.* at 26-27. The issue is whether, if petitioners voted not to renew respondent's contract because of his outspoken criticisms of the county on civic issues such as open public meetings, open public records, and landfill use, that vote violated respondent's First Amendment rights. The district court assumed, as it was required to do in view of the evidentiary record at the summary judgment stage, that "[re-

spondent's] comments did motivate the votes in favor of terminating [respondent's] contract with Wabaunsee County." J.A. 14. Under that assumption, the termination was a classic instance of viewpoint-based discrimination. See *Rosenberger*, 115 S. Ct. at 2516-2518; *Lamb's Chapel*, 113 S. Ct. at 2147. Petitioners may seek to prove on remand that respondent's comments did not play a motivating role in the Board's decision to terminate the contract. It is clear, however, that respondent has presented a claim of unconstitutional viewpoint discrimination.

II. THE ANALYSIS OF THIS COURT'S CASES RESTRICTING POLITICAL PATRONAGE IN PUBLIC EMPLOYMENT SUPPORTS RESPONDENT'S CLAIM

A. This Court's decisions restricting political patronage in the context of public employment have used a traditional unconstitutional-conditions analysis that supports respondent's First Amendment claim in this case. See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality opinion). The Court has held that patronage-based employment decisions are presumptively unconstitutional because, like petitioners' viewpoint-based retaliation, they penalize the exercise of First Amendment rights.[8] Unless patronage practices

[8] "[C]onditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree." *Rutan*, 497 U.S. at 69. Under a patronage system as described in *Elrod*, "[t]he threat of dismissal for failure to provide * * * support [for the favored political party] unquestionably inhibits protected belief and association, and dismisses

"are narrowly tailored to further vital government interests," they "impermissibly encroach on First Amendment freedoms." *Rutan*, 497 U.S. at 74. Only where "party affiliation is an appropriate requirement for the effective performance of the public office involved" may it be taken into account. *Branti*, 445 U.S. at 518.

As explained above, terminating respondent's contract in retaliation for his publicly expressed views similarly burdened his exercise of his First Amendment rights. Although respondent's claim involves neither political patronage nor public employment, it rests on the same basic constitutional analysis that this Court employed in *Rutan*, *Branti* and *Elrod*. The principle those cases apply is not limited to public employment or patronage, but applies generally where government conditions a benefit on the exercise of constitutional rights. See, *e.g.*, *Rosenberger*, *supra* (access to student activities funds cannot be conditioned on viewpoint expressed in student magazine); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984) (eligibility for public broadcasting funding cannot be conditioned on broadcaster refraining from "editorializing" with own funds); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (unemployment compensation cannot be denied based on conduct mandated by religious belief); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (eligibility for public contracts cannot be conditioned on waiver of Fifth Amendment privilege against self

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for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection." 427 U.S. at 359. See also *Branti*, 445 U.S. at 516 (referring to "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job") (quoted in *Rutan*, 497 U.S. at 71).

incrimination); *Speiser*, 357 U.S. 513 (eligibility for tax exemptions cannot be conditioned on taking loyalty oath).

B. In reaching the opposite conclusion, the district court in this case followed the Seventh Circuit's decision in *Downtown Auto Parks* v. *City of Milwaukee*, 938 F.2d 705, cert. denied, 502 U.S. 1005 (1991). *Downtown Auto Parks* held that an independent contractor who operated city parking lots had no First Amendment protection when the city terminated his parking lot leases because he lobbied the state legislature. The court of appeals stated that "[t]he adjudicated cases in this Circuit do not extend First Amendment protection to independent contractors whose bids for public contracts are rejected on the basis of their political views." *Id.* at 708. The district court here similarly concluded that courts "do not extend to independent contractors the same First Amendment protections granted to government employees." J.A. 14.[16]

The district court, and the Seventh Circuit in *Downtown Auto Parks*, arrived at this conclusion by two steps, neither of which was correct. First, they relied on a line of appellate decisions holding that public contractors do not have the same constitutional protection against patronage practices in government contracting as this Court has held public employees have against patronage in government employment.[17] Second, without additional

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[16] The Second Circuit has since stated, in a case involving speech unrelated to political patronage, that it had not yet resolved whether to follow *Downtown Auto Parks*. *Planned Parenthood of Dutchess-Ulster, Inc.* v. *Steinhaus*, 60 F.3d 122, 128 (2d Cir. 1995). But see *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1057, 1061 (2d Cir.), cert. denied, 114 S. Ct. 185 (1993) (assuming that contractors may bring First Amendment claims, but finding no actionable claim on the facts).

[17] See J.A. 14-17 (citing *Triad Assocs., Inc.* v. *Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), cert. denied, 498 U.S. 845 (1990);

analysis, they extended those cases to hold that contractors who lack protection against political patronage also lack protection against viewpoint-based retaliation. See *Downtown Auto Parks*, 938 F.2d at 709 n.5. The court of appeals cases authorizing patronage contracting seem inconsistent with *Rutan*, *Branti* and *Elrod*. But even if one were to accept them as a constitutionally valid effort to preserve the non-employment aspects of traditional methods of political patronage, they would be inapplicable here, where viewpoint discrimination, rather than patronage, was involved.[18]

This is not a patronage case. As petitioners acknowledge, "[t]here has never been any suggestion that Mr. Umbehr's contract was terminated so that he could be replaced with a political ally." Pet. Br. 15.[19] Indeed, the record does not even reflect the litigants' political party affiliations. Petitioners did not terminate respondent's contract for patronage reasons, nor did they find a replacement for him on partisan political grounds. Thus, even if patronage in government contracting were to be held to be consistent with the First Amendment, that plainly would not justify petitioners' public-speech-based retaliation.

Horn v. *Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc); *LaFalce* v. *Houston*, 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984); *Fox & Co.* v. *Schoemehl*, 671 F.2d 303 (8th Cir. 1982); *Sweeney* v. *Bond*, 669 F.2d 542, (8th Cir.), cert. denied, 459 U.S. 878 (1982)); *Downtown Auto Parks*, 938 F.2d at 708-710 (citing cases).

[18] The question whether patronage contracting is subject to First Amendment scrutiny is before the Court in the petition for a writ of certiorari in *O'Hare Truck Service, Inc.* v. *City of Northlake*, petition for cert. pending, No. 95-191 (filed July 31, 1995).

[19] Petitioners stated in the district court, too, that they were "the first to concede that no patronage was involved" in the termination of respondent's contract. Appellees' Supp. C.A. App. 657.

Political patronage and suppression of free expression are different practices. Political patronage refers to the use of party affiliation in the dispensation of government largesse, rather than to suppression of disfavored political speech.[20] This Court's political-patronage decisions uniformly refer to plaintiffs' "political affiliation," not their speech, as the basis for the challenged employment decisions.[21] The constitutional right involved in each of those cases was not the First Amendment right of employees to express themselves, but their right to freedom of political association.[22]

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[20] The *Random House Dictionary of the English Language* (1987) offers as one definition of "patronage" "the distribution of jobs and favors on a political basis, as to those who have supported one's party or political campaign."

[21] For example, the claim in *Elrod* was that the plaintiffs, Republican non-civil-service employees of the Cook County, Illinois, sheriff's office, were fired upon the election of a new sheriff (a Democrat), solely on the ground that they were not affiliated with or sponsored by the Democratic Party, and replaced with persons who were. 427 U.S. at 350. In *Branti*, a newly appointed Democratic public defender discharged Republican assistant public defenders based solely on their party affiliation. 445 U.S. at 520. Plaintiffs in *Rutan* were low-level state employees in Illinois who challenged the governor's policy of limiting all beneficial state employment decisions, including beneficial decisions as to promotion, transfer and recall, to supporters of the Republican Party. 497 U.S. at 66-67.

[22] In the context of public employment the Constitution affords different protections to political affiliation and political speech. For example, *Rutan* allows employment decisions regarding a confidential or high-level policymaking employee whose job requires political loyalty to be based on partisan political concerns. Such an employee, however, retains protection against speech-based retaliation insofar as the employee's speech is on matters of public concern and the employee's interest in the speech at issue outweighs the employer's interest in efficient and effective job performance. It is conceivable that a patronage case could also involve adverse action on the basis of

Accordingly, even if this Court were to accept the reasoning of the appellate decisions that have upheld patronage contracting, that would not lead to rejection of respondent's claim in this case. A rule aimed at protecting patronage practices in government contracting would not justify removing constitutional protection for contractors' public expression. Retaliation based on the viewpoint expressed in speech is not part of the historical tradition described by those who view patronage systems—because of their relationship to the two-party system—as a constitutionally permissible political choice.[23] The free expression of opinions on public issues, such as respondent's public statements and written editorials, has fulfilled an "historic function in this nation" by "informing and arousing the public, and by criticizing and cajoling those who hold government office in order to help launch new solutions to the problems of the time." *FCC* v. *League of Women Voters*, 468 U.S. at 382 (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940)). Retaliation against public contractors for expressing views at public meetings and in newspaper editorials has, in contrast, never been identified in First Amendment jurisprudence as playing a beneficial role in fostering the political culture of the United States.

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speech of the employee from the disfavored political party, thus requiring analysis under both lines of authority. See, *e.g.*, C. Singer, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. Chi. L. Rev. 897, 897-898, 918-923 (1992) (describing application of *Rutan* and *Pickering* to a hypothetical case involving both speech- and political-affiliation-based motives). This case requires no such dual analysis.

[23] See *Rutan*, 497 U.S. at 104-108 (Scalia, J., dissenting); *Branti*, 445 U.S. at 527-534 (Powell, J., dissenting); *Elrod*, 427 U.S. at 375-376 (Burger, J., dissenting); *id.* at 376-389 (Powell, J., dissenting).

C. In declining to recognize contractors' First Amendment claims, the Seventh Circuit relied in part on the risk that allowing such claims to proceed would "invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Downtown Auto Parks*, 938 F.2d at 709 (quoting *LaFalce*, 712 F.2d at 294). There are, however, few reported cases of non-patronage-related First Amendment claims by independent contractors,[24] notwithstanding that only the Seventh Circuit categorically bars such claims. The danger the Seventh Circuit identified is too speculative to justify eliminating constitutional protection altogether.

Where contracting with the federal government is concerned, the virtual absence of First Amendment claims may result from the fact that procedures for contracting by the Executive Branch are prescribed in detail by statutes and regulations.[25] Federal law generally re-

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[24] See, *e.g.*, *Blackburn* v. *City of Marshall*, 42 F.3d 925, (5th Cir. 1995); *Terminate Control Corp.* v. *Horowitz*, 28 F.3d 1335, 1353 (2d Cir. 1994); *Enplanar, Inc.* v. *Marsh*, 11 F.3d 1284, 1296 (5th Cir.), cert. denied, 115 S. Ct. 312 (1994); *Downtown Auto Parks*, *supra*; *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1057, 1061 (2d Cir. 1993); *Abercrombie* v. *City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990).

[25] Government contracting law covers several broad categories of contracting, including (1) procurement of property, other than real property, (2) procurement of services, including research and development, and (3) construction, alteration, repair, or maintenance of real property. See 41 U.S.C. 405(b). The Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. 2301-2314, covers procurement for the Department of Defense, and the Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. 251-260, covers procurement outside the military context. The Office of Federal Procurement Policy generally administers federal contracting law, including the ASPA and the FPASA. 41 U.S.C. 405a. Contracts for real property and automatic data processing and telecommunications equipment,

quires full and open competition for government contracts. See generally 10 U.S.C. 2304-2305; 41 U.S.C. 253(a), 253a, 253b.[26] The Federal Acquisition Regulations include hundreds of approved standard contract clauses for use in federal contracting, 48 C.F.R. Pt. 52, and use of those clauses helps to ensure fair and uniform contracts and to eliminate claims of unequal treatment.

The risk that disgruntled contractors will bring frivolous constitutional claims in federal court may also be diminished by the availability of federal administrative processes to resolve contractors' complaints of unfair treatment. See generally Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601-613; 48 C.F.R. Pt. 33; 48 C.F.R. 52.233-1 to 52.233-2. Claims subject to administrative resolution include all claims against the government "relating to a contract." 41 U.S.C. 605(a).[27] Because the permissible reasons for adverse contract action are tightly circumscribed, see, *e.g.*, 48 C.F.R. 52.249-8, 52.249-10 (regarding contract termination), actions taken for impermissible reasons often can be resolved administratively under the contract.

The federal scheme illustrates that there are means by which to minimize the kind of discretionary decisionmaking that can lead to claims of unconstitutional treatment, and to provide appropriate mechanisms for resolving

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however, are administered by the General Services Administration, 40 U.S.C. 490(a)(12), 601-619, 759.

[26] Exceptions to the competitive requirements are made only in statutorily specified circumstances in which use of such requirements is not feasible. See *e.g.*, 10 U.S.C. 2304-2305; 41 U.S.C. 253(c)-(f), 254.

[27] A claimant may appeal to an agency board of contract appeals and then to the Federal Circuit, 41 U.S.C. 605(b), 606, 607(g), or, in lieu of such an appeal, may bring an action on the claim directly in the United States Claims Court, 41 U.S.C. 609.

contract disputes when they arise. The flood of First Amendment claims in federal court that the Seventh Circuit predicted has thus far been avoided under the federal government contracting system. In the absence of any demonstrated basis for believing that continued recognition of contractors' First Amendment rights is incompatible with efficient and effective government contracting, those rights should not completely be denied protection.

III. THE *PICKERING* BALANCING TEST IS INAPPLICABLE HERE BECAUSE RESPONDENT'S SPEECH DID NOT IMPAIR ANY SUPERVISORY OR MANAGERIAL FUNCTION

This Court's analysis of whether and when *Pickering* applies to public contractors must take into account both the legitimate interests of the government in ensuring effective contract performance and the constitutional rights of individuals who enter into contractual relationships with the government. The *Pickering* test reflects the fact that certain types of employee speech can impair managerial authority, and that ineffective management hinders the operations of government.[28] The same is true of contractor speech that impairs the effectiveness of governmental contracting officers in ensuring contract

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[28] To be protected under the *Pickering* test, a public employee's speech "must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to '"the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."'" *Waters* v. *Churchill*, 114 S. Ct. 1878, 1884 (1994) (plurality opinion) (quoting *Connick* v. *Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568)). Whether speech addresses matters of public concern is a fact-specific inquiry based on the content, form and context of the speech. *Connick*, 461 U.S. at 147-148.

effectiveness. The courts of appeals that have addressed the question have thus held that, where the relationship between the government and the contractor is similar to a public employment relationship, *Pickering* should apply. See note 30, *infra*. Public contracting often, however, involves arms-length transactions between contracting officers and private businesses that do not implicate the structural concerns to which *Pickering* responds. In those contexts, *Pickering* does not supply the appropriate test.

A. *Pickering* is inapplicable here. Respondent's claim should be evaluated under the level of First Amendment scrutiny that generally applies to viewpoint-based conditions imposed on recipients of government benefits. Under that analysis, no public-concern threshold applies, and the government may only suppress speech where necessary to ensure effective government contracting.

The *Pickering* balancing test applicable to restrictions on public employee speech does not apply to non-employee speech such as respondent's, that takes place outside the workplace and does not impair the management abilities of governmental supervisors or contracting officers. The government's increased authority to regulate speech under the *Pickering* public employee speech doctrine derives from the need of government, when acting as an employer, to preserve the integrity of supervisory relationships and the smooth functioning of the government workplace. *Waters*, 114 S. Ct. at 1887-1888; *Rankin* v. *McPherson*, 483 U.S. 378, 384 (1987); *Connick* v. *Myers*, 461 U.S. 138, 151-152 (1983); *Pickering*, 391 U.S. at 568-570, 572-574. As this Court stated in *Connick*, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S.

at 146. Employees' workplace complaints can "threaten[] the authority of the employer to run the office." *Id.* at 153. The public employee speech doctrine accordingly establishes that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

The typical government-contract setting does not require prerogatives analogous to those that the employee speech cases seek to protect. Public contracts are generally performed outside of the government workplace, according to contractually established specifications, and without repeated and ongoing interaction between the governmental contracting officer or other governmental supervisory personnel and the contractor. This case is an apt illustration. Respondent contracted with the county for trash collection service at a specified price. He was not supervised by government personnel in the performance of that service, nor did he perform the contract in a government workplace, where he might have engaged in speech that undermined the authority of government supervisory personnel, such as by directly challenging supervisory credibility or distracting co-workers with discussions of personal workplace grievances. Cf. *Connick*, *supra*.[29] Even where public employee

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[29] Petitioners themselves distinguish arms-length contracting of the kind at issue here with the supervisory relationships inherent in public employment. Pet. Br. 18. As they describe it, "[t]he relationship between an employer and an employee differs significantly from the relationship between a principal and an independent contractor." *Ibid*. Whereas public employers must "maintain day to day control of the details of the manner in which the work is performed by employees," under many contracts, the government has a right to delivery of the end product, but "the contractor exercises the right to control the details on a daily basis." *Ibid*. Petitioners contend that those differences should entitle the government to greater latitude to

speech was at issue, the Court has recognized that the interest asserted in Pickering—preventing "immediate workplace disruption"—does not justify restrictions on speech that "does not involve the subject matter of government employment and takes place outside the workplace." *United States* v. *National Treasury Employees' Union (NTEU)*, 115 S. Ct. 1003, 1015 (1995).

Some government contractors are, for purposes of *Pickering*, in a role sufficiently similar to that of public employees that the *Pickering* test should apply to them. Courts of appeals have, therefore, consistently held that the limitations on speech that *Pickering* authorizes for public employees are appropriate for public contractors who operate under the ongoing managerial supervision of government personnel.[30] Although there are likely many

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rely on speech in terminating contracts. The logic of *Pickering*, however, suggests the opposite conclusion.

[30] See, *e.g.*, *Smith* v. *Cleburne County Hosp.*, 870 F.2d 1375, 1381 (8th Cir.) (applying *Pickering* to non-employee doctor with contract granting him staff privileges and responsibilities at public hospital because, "[w]hile there is not a direct salaried employment relationship, there is an association between the independent contractor doctor and the Hospital that have similarities to that of an employer-employee relationship."), cert. denied, 493 U.S. 847 (1989); *Caine* v. *Hardy*, 943 F.2d 1406, 1415-1416 (5th Cir. 1991) (en banc) (same), cert. denied, 493 U.S. 847 (1989); *Davis* v. *West Community Hospital*, 755 F.2d 455 (5th Cir. 1985) (same); *Copsey* v. *Swearingen*, 36 F.3d 1336, 1344 (5th Cir. 1994) (applying *Pickering* to non-employee vendor in program for the blind in State capitol building); *Havekost* v. *United States Dep't of the Navy*, 925 F.2d 316, 317-318 (9th Cir. 1991) (applying *Pickering* to non-employee grocery bagger licensed to work in Naval commissary).

Personal Service contracts provide an example, at the federal government level, of contractors who should be governed by *Pickering*. Under federal law, a "personal services contract" is one that, "by its express terms or as administered, makes the contractor personnel

situations in which the relationship between government and its public contractors is sufficiently intertwined to make a *Pickering* analysis applicable, this is not such a case.

That respondent's speech should not be subject to *Pickering* is underscored by the lack of a direct relationship between his speech and his contract obligations. Cf. *NTEU*, 115 S. Ct. at 1013 (noting that *Rankin* v. *McPherson*, 483 U.S. 378 (1987), "is the only case in which [the Court] applied the *Pickering* balance to speech whose content had nothing to do with the workplace"). Respondent's contract in this case was under the supervision of the county's Solid Waste Administrator. None of respondent's expression was directed at the Administrator, nor did respondent question the county's implementation of the contract. His public utterances primarily criticized county government on issues relating to open governance. Although respondent also addressed the continued operation of the county landfill and

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appear, in effect, [to be] Government employees," 48 C.F.R. 37.101, *i.e.*, one that is "characterized by the employer-employee relationship it creates," 48 C.F.R. 37.104(a). An employer-employee relationship is created where the government will "exercise relatively continuous supervision and control over the contractor personnel performing the contract." 48 C.F.R. 37.104(c)(2); see generally 48 C.F.R. 37.404 (detailing types of circumstances in which such control exists). Federal personal service contracts must be statutorily authorized, because "the Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws." 48 C.F.R. 37.104. "In no event," however, "may a contract be awarded for the performance of an inherently governmental function," 48 C.F.R. 37.102(b), *i.e.*, a function so intimately related to the public interest, such as one requiring the exercise of personal judgment and discretion, as to require performance by government employees, see OMB Circ. No. A-76, at ¶¶ 5(b), 6e (Aug. 4, 1993).

criticized proposed increases in landfill user rates, he did so as a citizen rather than a contractor.[31] Respondent's public speech therefore is not analogous to the kind of speech to which *Pickering* is addressed.

Where *Pickering* does not apply, the government nonetheless retains the ability to ensure effective performance of its contracts. The government has a vital interest in restricting contractors' activities that would interfere with the performance of a government contract. *NTEU*, 115 S. Ct. at 1016 ("operational efficiency is undoubtedly a vital governmental interest"). Where no less restrictive means than suppression of speech is available to protect it,[32] such an interest will satisfy the First Amendment standard.

B. Even if *Pickering* applied in this case, the judgment of the court of appeals reinstating respondent's First Amendment claim was correct. Respondent's expression met the *Connick* public-concern threshold, and the *Pickering* balance, if applicable, would tip decidedly in his favor. Petitioners clearly err in their assertion that,

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[31] See *Pickering*, 391 U.S. at 574 (where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication," the plaintiff must be regarded "as the member of the general public he seeks to be"). To be sure, just as the teacher in *Pickering* was knowledgeable about the operation of the school system because he was a teacher, *id.* at 571-572, respondent, due to his role as the county's trash collector, may have been more knowledgeable than the average county resident regarding landfill issues.

[32] If contractors' self-expression would otherwise be mistaken for speech by or on behalf of the government, we believe that the government may, consistent with the First Amendment, require the contractor to make clear that the government does not endorse the contractor's message. Cf. *Capitol Square Review and Advisory Bd.* v. *Pinette*, 115 S. Ct. 2442, 2450 (1995).

"[h]ad [respondent] been an employee he could have been fired for insubordination for the remarks he made in county commission meetings, despite the public interest in the issues at stake, under the balancing test of *Pickering*." Pet. Br. 22.

The matters upon which respondent spoke at the Board meetings and in the newspapers were not, as petitioners claim (Pet. Br. 32), "personal matters," but were issues of public concern. Petitioners' non-compliance with state law regarding open meetings and open records is, in the judgment of the State's own legislature, a matter of importance to the proper administration of state and local government. Questions regarding the continued functioning and financing of the county landfill were also of public concern. The lack of an operating landfill in the county could, as respondent pointed out in his column, result in greater illegal roadside refuse dumping, C.A. App. 57, and if the landfill remained open but substantially increased its rates, the residents themselves could pay higher fees, *id.* at 106-107. The public at large could readily be expected to have an interest in hearing about issues that could thus affect their wallets and the cleanliness of their environment. There is also no evidence that respondent's speech interfered in any way with performance of the trash hauling service under the contract, and thus no factual basis for a conclusion under *Pickering* that a government interest outweighed respondent's right to speak out on matters of public concern.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for further proceedings.

Respectfully submitted.

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MISCELLANEOUS

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No. 94-1654

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GLEN HEISER and GEORGE SPENCER,
Petitioners,

v.

KEEN A. UMBEHR,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Planned Parenthood Federation of America, Inc. is the leading national voluntary health organization in the field of family planning.[1] Planned Parenthood and its 158 affiliates

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[1] The parties have consented to the filing of this brief.

engage in public education and advocacy of safe and legal access to all reproductive health services, and freedom of individual choice among those services, including abortion. The Court has recognized that Planned Parenthood's speech on these subjects is constitutionally protected, and that the public has a First Amendment right to receive this speech, which involves subjects of undeniable public concern. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

Through its affiliates, Planned Parenthood operates approximately 925 clinics in 49 states which offer a wide range of medical services such as reproductive health services, including abortions, and cancer screenings services. Because of Planned Parenthood's well-known advocacy on the controversial question of abortion rights, it has been the target of various attempts to cancel contracts providing medical services, or to preclude it from competing in the bidding process for such contracts:

- In 1980, due in large part to Planned Parenthood's "abortion stance [which] has made itself unpopular," the Minnesota legislature precluded state funds from being used in any state contract to any nonprofit corporation which performs abortions. *Planned Parenthood of Minnesota v. Minnesota*, 612 F.2d 359, 361 (8th Cir. 1980), *aff'd*, 448 U.S. 901 (1980).

- In 1990, the City Council of Wichita, Kansas canceled a contract with Planned Parenthood to provide family planning services because Planned Parenthood advocated "certain unpopular ideals." *Planned*

Parenthood of Kansas v. City of Wichita, 729 F. Supp. 1282, 1288 (D. Kan. 1990).

- In 1993, following an active anti-Planned Parenthood campaign by opponents of abortion rights, the City Council of El Paso, Texas voted to deny a grant to Planned Parenthood to provide cancer screenings.

- In 1994, in Dutchess County, New York, Planned Parenthood was prevented by county executives from competing for a family planning services contract which it held for thirteen years, because of its views on abortion rights. *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2d Cir. 1995).

- Georgia legislators are engaged in continuing attempts to deny state funding to Planned Parenthood programs providing reproductive health services because of the legislators' opposition to Planned Parenthood's advocacy of sexuality education in schools, as well as its public position on abortion rights.

Consistent with the experience illustrated by these examples, Planned Parenthood expects to face again denial of the opportunity to hold or compete for government contracts as a direct result of its speech advocating abortion rights.

Denial of access to governmental funds would significantly impair Planned Parenthood's ability to provide services

through its clinics. These clinics are generally operated with a combination of government grants, private donations, and patient fees. They provide services and counselling to many patients who are ineligible for government medical assistance; they charge their clients according to their abilities to pay. The amount of government funding varies from as much as 70% of clinic operating funds to as little as 0.1%. Typically, combined federal and state funding provides about 25% to 30% of the clinics' operating funds. Loss of these funds would severely harm Planned Parenthood's ability to continue to provide basic services.

Because the First Amendment does not permit government to use its power to coerce its citizens to adhere to a set position on matters of public concern, *amicus* urges the Court to hold that government contractors—like the general public and like government employees—are protected by the First Amendment from retaliation for engaging in political debate.

STATEMENT OF THE CASE

Amicus adopts respondent's statement of the case.

SUMMARY OF ARGUMENT

There is no real question that the First Amendment protects the speech of government contractors. Neither precedent nor constitutional theory justifies the categorical exclusion of government contractors, as a class, from First Amendment protection. Point I. The more serious issue involves the appropriate degree of First Amendment protec-

tion for such speech. Because the only difference between contractors and ordinary citizens is the government contract, government has no legitimate interest in restricting any contractor speech unless that speech directly and materially impairs performance of the contract. The government has no legitimate interest in prohibiting government contractors from speaking about matters of public concern merely because the government disagrees with their views. Retaliation against contractors for speech that does not impede performance of the contract therefore fails to further any legitimate government interest. Point II.

ARGUMENT[2]

The abuse of government power at issue in this case poses a direct threat to the most basic First Amendment values. The constitutional *carte blanche* assumed by the petitioner County Commissioners is an extraordinarily powerful weapon for silencing those with whom the government disagrees. If the government can use its control over a government contract to punish a speaker because of his views on matters of public concern, it can suppress that viewpoint. But members of the public do not lose their First Amendment rights merely because they enter into government contracts. The First Amendment protects all citizens from government overreaching intended to punish speech and compel ideological orthodoxy.

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[2] The only questions presented by this case involve the applicability and degree of First Amendment protection for speech by government contractors. Retaliation against government contractors based on their speech may also violate the Equal Protection Clause or other constitutional provisions.

I. THE FIRST AMENDMENT PROTECTS GOVERNMENT CONTRACTORS FROM RETALIATION FOR SPEECH ON MATTERS OF PUBLIC CONCERN.

1. The Court has denied First Amendment protection to a few narrowly confined categories of *speech*.[3] But it has consistently refused to deny First Amendment protection to categories of *speakers*. "The identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 8 (1986). "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). *See also Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516 (1995).

Therefore, categorically denying First Amendment protection to government contractors as a class would constitute a radical departure from settled First Amendment jurisprudence. The break would be particularly unwarranted because it would permit government to retaliate against a government contractor precisely because government did not like what the contractor was saying. The core purpose of the First Amendment is to prevent government from silencing its critics by suppressing or discouraging expression of particular

[3] *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words).

viewpoints. *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984).[4]

There is no jurisprudential or empirical reason to categorically exclude government contractors, and only government contractors, from the protection of the First Amendment. It has long been the law that although government may award or deny benefits—such as contracts—for many reasons, it may not do so for reasons that violate constitutional rights. Indeed, the Court has squarely held that exercising First Amendment rights is *not* a legitimate reason for denying government benefits, including public employment, tax exemptions, unemployment benefits, and welfare payments. *Perry v. Sinderman*, 408 U.S. 593, 597-98 (1972).

2. The rationale of the Court's decisions in *Rust v. Sullivan*, 500 U.S. 173 (1991), and *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), confirms the Court's earlier ruling in *Perry* that speech does not lose First Amendment protection simply because it is uttered by beneficiaries of government programs. In *Rust*, the Court emphasized that the speech restrictions at issue there (specifically,

[4] The First Amendment prohibits government from proscribing, punishing, or financially burdening speech, especially when the governmental action is motivated by governmental disapproval of the ideas expressed. *E.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 115 (1991). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. 310, 319 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

prohibitions on counselling, referral, or provision of information about abortions) were permitted because they applied to programs, not to persons:

> here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.

500 U.S. at 196. The Court distinguished the "unconstitutional conditions" cases by noting that they "involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197 (emphasis added).

Similarly, in *League of Women Voters*, the Court struck down a regulation barring all editorializing on radio stations that received any public funds. The regulation violated the First Amendment because it prohibited recipients from using their own funds to speak on one subject if they used federal funds to speak on other subjects. 468 U.S. at 400. Thus, even where government can exercise some control over speech that it directly funds, that control cannot be extended to all speech of speakers who accept any of that funding.

3. For nearly three decades the Court has consistently recognized that the First Amendment protects the speech of the class of speakers most like independent government contractors: public employees. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *Connick v. Myers*, 461 U.S. 138, 145-47 (1983); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). Like ordinary citizens, government employees enjoy the right to debate issues of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146.[5] Indeed, employee speech makes a special contribution to the central goal of the First Amendment "to protect the free discussion of government affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), because "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994) (plurality opinion).

Government contractors should enjoy at least the same protection as government employees. Indeed, government employees work pursuant to a contract of employment and, in that sense, are government contractors. The government has no legitimate interest in plenary, uncircumscribed control of the speech of thousands of companies and millions of

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[5] *Amicus* believes there should be no categorical denial of First Amendment protection for the speech of government contractors, even if the speech is *not* of public concern. It is not necessary to decide that question, however, in order to decide this case, because respondent's speech was undeniably a matter of public concern.

individuals who happen to contract with the government or otherwise receive government funds.[6]

4. There is no basis for the argument that contractors do not require First Amendment protection because they do not depend on government funds to the extent employees depend on their paychecks. Although proposed—without evidence—by some lower courts, *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), this argument is empirically unsound and legally insupportable. At minimum, the argument is premised on a faulty understanding of the relevant facts. An analysis of the top twenty-five federal contractors shows that nearly 40% of them obtained more than half of their 1994 revenues from contracts with the United States government. Another 20% obtained at least 25% of their revenues from government contracts.[7] If these contractors were to lose such a substantial portion of their revenues, the effect on these companies would be quite as serious as a government employee losing her job. Indeed, such a loss of revenue would likely

[6] The federal government alone reported nearly 19 million separate contract actions during fiscal year 1994 involving almost 200 billion dollars. Federal Procurement Data Center, *Federal Procurement Report* (Fiscal Year 1994 through Fourth Quarter) at 2 (Feb. 7, 1995). State and local governments enter into countless additional contracts affecting millions of individuals, so it is clear that the "class" of government contractors is large, wide-spread, and diverse.

[7] The list of top contractors comes from the *Federal Procurement Report* (Fiscal Year 1994 through Fourth Quarter) at page 14. The Report also shows the dollar amount paid to each of the top contractors. *Amicus* determined the percentage of revenue by comparing that dollar amount to the total revenues reported in each company's 10-K form filed with the Securities and Exchange Commission.

result in layoffs that would affect untold numbers of individual employees. And many smaller contractors may be even more vulnerable. Several Planned Parenthood affiliates, for example, receive nearly 70% of their operating funds from combined government sources, and the average affiliate receives 25-30%. The loss of these funds would likely mean severe cutbacks in services, or closing the clinics' doors.

Moreover, many contractors have expertise that is useful *only* to the government. Loss of government contracts would put them out of business, and their employees out of work. The same is not necessarily (or even likely) true for government employees, many of whom have alternatives to government employment because they have skills that are equally valuable in the private sector.

More important, even if the factual circumstances were otherwise, the argument is fatally inconsistent with the Court's First Amendment jurisprudence. First Amendment protections have never depended on whether the degree of financial burden imposed by governmental restrictions is limited or devastating.[8] Any burden on speech that is more than *de minimis* triggers First Amendment review. The Minnesota tax on newspaper ink was held unconstitutional even though it was scarcely expected to drive the affected newspapers out of business. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). And the federal prohibition against editorializing by educa-

[8] The argument that constitutional protection hinges on economic dependency was specifically rejected by this Court in the context of a Fifth Amendment claim in *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973).

tional broadcasters was struck down without regard to whether the broadcasters were wholly dependent on federal subsidies. *League of Women Voters of California*, 468 U.S. at 400 (1984) (government funding of some public stations was as little as 1%).

By the same token, the extent to which the First Amendment protects government employees does not vary depending on the degree of their economic dependency on the government. If a part-time government employee were independently wealthy or made more money at a second, non-government job, he would not consequently lose any of his First Amendment protection as a government employee. Thus, whether a government contractor is wholly dependent on government contracts, or whether she could easily replace the government business with private business, is irrelevant to whether her speech as a government contractor is entitled to First Amendment protection. The First Amendment is a restraint on the power government may wield to suppress speech, not a gift conferred on the basis of need.

5. The distinction drawn by some lower courts between government employees and contractors in patronage cases provides no support for denial of First Amendment protection to contractor speech in this case. *See, e.g., Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986). Those courts concluded that the government's interest in preserving the two-party system and encouraging active participation in the process of elective government justified partisan preferences in selecting contractors. *Id.* at 672-74. Retaliating against contractors because of their speech—which is at issue here—is different. Such retaliation does not further any legitimate government

interest in a two-party system or in encouraging political involvement.

Furthermore, the basis for these lower court decisions is at best questionable. This Court has never held that the interests asserted in defense of patronage—preserving the two-party system and encouraging participation in elections—justify terminating government contractors based on their party affiliation.[9] The only exception this Court has ever suggested to the constitutional rule against patronage-based employment decisions is that party affiliation may be a legitimate factor in selecting individuals for *policy-making* jobs. *Elrod*, 427 U.S. at 368. To the extent the interest in effective government justifies this limited exception for high-level employees, it may justify the same limited exception for contractors that perform equivalent policy-making functions. But it does *not* justify an unbounded exception for *all* government contractors.[10]

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[9] At most, the Court has approached the constitutional issues raised by patronage cautiously, one by one. Thus, in *Elrod v. Burns*, 427 U.S. 347, 353 (1976), and *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980), the Court found dismissal of a government employee based on party affiliation unconstitutional. Although the Court observed in those cases that only dismissal was at issue, the Court has since then extended the principle articulated in those decisions to "several related political patronage practices." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 65 (1990).

[10] To the extent lower courts have found patronage-based actions against government contractors justified, they have relied on this Court's suggestion that "[p]reservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms." *Horn*, 796 F.2d at 674 (citing *Elrod*, 427

(continued...)

6. Finally, petitioners' contention that categorical denial of First Amendment protection for speech by government contractors is justified because government needs broad authority to terminate government contracts if contractors are not fulfilling their contractual obligations, is meritless. No one disputes the government's right to terminate a contract if the contractor is not performing the contract. The different issue presented by this case is whether the government can terminate a contract or otherwise retaliate on the basis of the contractor's speech when the speech is *not* likely to impair performance of the contract.[11]

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[10] (...continued)
U.S. at 368). The instances actually cited by the Court, however, were campaign finance reform and the Hatch Act—not termination of government contracts based on party affiliation.

[11] Petitioners' suggestion (Pet. Br. 30-32) that First Amendment protection for speech by contractors would open the floodgates to litigation and would force courts to probe the motivations of government officials whenever they terminate contracts (or refuse to consider particular bids) is a straw man. Although the constitutional contours of such a challenge are well-established, contractors rarely challenge decisions to terminate, or not to grant, contracts based on speech unrelated to contract performance. And in those rare cases, there is no reason to believe it will be more difficult for courts to determine the true motivation for termination of contracts than it is to determine the true motivation for termination of an employee's job.

II. THE FIRST AMENDMENT GUARANTEES FULL PROTECTION FOR CONTRACTOR SPEECH ON MATTERS OF PUBLIC CONCERN THAT DOES NOT IMPEDE PERFORMANCE OF THE CONTRACT

1. For the reasons discussed above, it is clear that government contractors do not surrender their First Amendment rights at the procurement officer's door. The real issue is not whether the First Amendment applies to speech by government contractors, but how it applies.

In the government employment context, the Court has held that the "extra power [to regulate speech] the government has in this area comes from the nature of the government's mission as employer." *Waters v. Churchill*, 114 S. Ct. at 1887. Similarly, the government's only legitimate interest in withholding or terminating contracts based on speech comes from the government's position as purchaser of goods or services.[12] Were it not for the contract, government contractors would have the same rights to speak as any other citizen. Thus, the only conceivable basis for government regulation of contractor speech (when

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[12] At issue here is the *additional* interest the government has in regulating the speech of a contractor, as opposed to the speech of a member of the public, because of the contract relationship. A government contractor has no immunity because of his relationship with the government. If the government can take action against an ordinary citizen for her speech, it may act against a government contractor for the same speech. Thus, regardless of the contract, government could regulate speech if it had a compelling need to do so—in order to protect national security, for example—and did so in a narrowly tailored way.

government could not regulate the same speech by a member of the public) is the government's interest in full and effective performance of the contract.

The lesson of the government employee cases is that the government's ability to restrict employee speech (when it could not limit the same speech by a member of the public) is limited by its interests as employer. Recognizing that government as employer has interests that would justify "restraints on the *job-related* speech of public employees that would be plainly unconstitutional if applied to the public at large," the Court balances the interest of the employee, as citizen, and the interest of the government, as employer. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012 (1995). The critical issue is these cases is whether the speech impedes the government's legitimate interests as employer.

Thus, in *Pickering*, the speech of a governmental employee (a teacher) did *not* justify adverse governmental action because the teacher's statements, which criticized the School Board, were "neither shown nor can be presumed to have in any way either *impeded* the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572-73 (emphasis added). Because the speech did not impede performance, the Court concluded that the school administration's interest "in limiting teachers' opportunities to contribute to public debate is *not significantly greater than its interest in limiting a similar contribution by any member of the general public.*" *Id.* (emphasis added) *See also NTEU*, 115 S. Ct. at 1013 n.11

("our *Pickering* cases only permit the Government to take adverse action based on employee speech that has adverse *effects* on 'the interest of the State, as an employer.'") (emphasis in original).[13]

The burden on the government to justify restrictions of contractor speech should be greater than in the case of employee speech because the government generally has *less* legitimate interest in regulating speech by contractors than in regulating speech by employees. Effective performance of the contract is defined largely by the terms of the contract while an employee's performance is judged by less precise standards. For this reason, several governmental interests in regulating employee speech lose much of their force in the government contract context. For example, one justification for limits on employee speech is that the government can speak only through its employees, and the public is therefore likely to impute employee speech to the government. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). But the public is much less likely to impute the speech of government contractors to the government. For example, if a big defense contractor lobbies for increased defense spending, the public does not perceive that it speaks for the government. Another justification in the employee context is the government's

[13] This rule is often expressed as a requirement that the speech be *related* to the employment. In *NTEU*, for example, the Court struck down regulations because they restricted speech that was not related to government employment. *NTEU*, 115 S.Ct. at 1017-18. However, speech can *relate* to government employment and still not impair any legitimate interest in that employment, as *Pickering* makes clear. Thus, the real test is whether the speech will impede performance of the job or of the contract. In general, however, speech that is unrelated to the job or contract is very unlikely to impede performance of the job or contract.

interest in an efficient, harmonious workplace. *Pickering*, 391 U.S. 569-70. Again, this interest has less relevance to government contracts because contractor employees do not usually perform them in a government-run workplace. Given the lack of these kinds of government-as-employer concerns in the government contractor cases, the test for determining whether adverse government action against contractors violates the First Amendment must be tied specifically to the only legitimate interest the government has: performance of the contract.

2. For these reasons, in any case in which the government takes adverse action against a government contractor based on speech, the government must show that the speech directly and materially impairs performance of the contract. Any more indirect or attenuated relationship between the speech and contract performance would allow government undue latitude to suppress speech simply because government disagrees with the views expressed. The burden is always on the government to justify adverse action based on speech by articulating the governmental interest—here, contract performance—and demonstrating how the speech impedes that interest. *NTEU*, 115 S. Ct. at 1013.[14]

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[14] The appropriate protection for contractor speech on matters of public concern that *does* impede performance of the contract is a difficult question that need not be resolved in this case. However, the fact that contractor speech does impair performance of the contract does not necessarily justify any adverse governmental action. Instead, in our view, the question then is whether the adverse governmental action is narrowly tailored to serve the government's interest in contract performance. *See McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 (1968).

3. More limited protection for contractor speech would give government undue power to enforce political orthodoxy upon a huge number and range of citizens. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597. Diminished First Amendment protection for such speech would therefore give the incumbent administration the power to coerce unwilling support for its own positions, chilling the right to disagree with or even discuss the official line. By conditioning contracts explicitly or implicitly on support for its position, government could exercise frightening power.

The practical effect would be wide-spread and substantial because of the enormous number and diversity of government contractors and other beneficiaries of government programs. *See* p. 10, n.6, *supra*. Moreover, government is increasingly contracting out services it has traditionally provided through employees, such as the administration of schools and prisons, thus increasing the business it does with contractors.

Furthermore, these effects would not be confined to any clear class of "government contractors." "[F]ew large-scale endeavors are today not supported, directly or indirectly, by government funds—from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious." *Board of Trustees of Leland Stanford Junior University v. Sullivan*, 773 F. Supp. 472, 478 (D.D.C. 1991). The language and purpose of the First Amendment provide no basis to distinguish between award or termination of (1) public employment (which involves a

contract of employment whether written or oral), (2) a government contract not relating to employment, and (3) the distribution of other benefits by the government, such as licenses, tax exemptions, welfare and unemployment benefits, and zoning permits.[15]

For example, if the Department of Agriculture decided it was in the public interest to grow more soybeans, it could implement that policy in a number of ways: by employing farmers to grow soybeans on federal land; by contracting with farmers to grow soybeans; by leasing private farmland on which employees or contractors would grow soybeans; by giving subsidies to farmers who grow soybeans; or by giving a tax break to farmers who grow soybeans. If the Department of Agriculture has broad power to refuse to allow a farmer to compete for a contract to grow soybeans because he had written a letter to the editor of his weekly newspaper criticizing the United States' position on Bosnia, or even U.S. agricultural policies, it could also refuse to lease his farmland or to grant him subsidies or a tax break for the same reason. This "invitation to government censorship wherever public funds flow" would take the door opened by *Rust* "off its hinges." *Stanford University*, 773 F. Supp. at 478.

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[15] The principle that government may not deny benefits based on speech applies to a wide variety of benefits, including: tax exemptions, *Speiser v. Randall*, 357 U.S. 513 (1958); unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963); welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); and public employment, *Perry v. Sinderman*, 408 U.S. at 597.

CONCLUSION

Because speech by a government contractor that does not impair performance of the contract is fully protected by the First Amendment, that speech may not constitutionally be the basis for a government decision adverse to the speaker. The Court should therefore affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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No. 94-1654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

—v.—

KEEN A. UMBEHR,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF KANSAS, AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members, and the ACLU of Kansas is one of its state affiliates. The ACLU was founded over seventy-five years ago to preserve and protect the fundamental principles of the Bill of Rights. Central to those principles is the First Amendment's guarantee of freedom of speech. The ACLU has appeared in numerous cases where the government has argued that the values protected by the First Amendment, including the right to speak out on matters of public concern, are outweighed by a compelling governmental interest that justifies suppression.

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. The Center has, since its opening in 1990, pursued that mission in various forms, including the filing of *amicus curiae* briefs in a number of cases, in both federal and state courts, that have involved free expression issues.

Amici believe that the maintenance of the opportunity for free and uninhibited discussion, particularly on matters of political concern, is a fundamental principle of our constitutional system and that governmental suppression of such speech by, among other things, retaliating against the speaker, is constitutionally impermissible except in rare and narrowly defined circumstances. We respectfully submit this brief in the hope of assisting the Court as it considers where the appropriate constitutional lines should be drawn in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

In early 1991, the Commissioners of Waubunsee County, Kansas, terminated a contract between the county and respondent Keen Umbehr, pursuant to which Mr. Umbehr had collected residential refuse for ten years from six rural communities located within the county.[2] *Umbehr v. McClure*, 44 F.3d 876, 877 (10th Cir. 1995). Shortly thereafter, Mr. Umbehr brought suit against the Commissioners in the United States District Court for the District of Kansas, alleging that they had terminated his contract in direct retaliation for his public criticisms of the County Commission.

Several years prior to the contract termination, Mr. Umbehr, who had always been actively involved in matters of concern to county residents, had begun to criticize the manner in which the County Commissioners fulfilled their job responsibilities. In letters to the editor of the county paper, in a weekly newspaper column in the same paper and at meetings of the County Commission, he expressed views concerning, among other things, landfill user rates, misuse of government property, mismanagement of taxpayer funds, closed-door sessions of the County Commission in violation of the state's open meeting statute, and the cost of obtaining county documents. *Id.*

Mr. Umbehr's letters, news columns and speeches attracted the attention of the Attorney General of Kansas, who initiated two different investigations into matters raised by

[2] Under the terms of the contract, Mr. Umbehr could haul trash for the six communities, provided each community endorsed and ratified the contract. No community was under any obligation to ratify the contract and each community had the right to opt out of the contract. *Umbehr v. McClure*, 44 F.3d at 877. After termination of his contract, Mr. Umbehr negotiated individual trash collection contracts with five of the communities. *Id.* at 878.

Mr. Umbehr, including: (1) the misuse of county equipment and taxpayer money, and (2) the Commission's violation of the state's open meetings statute. The first investigation concluded, among other things, that taxpayer funds and resources had been improperly used by county employees, and the second resulted in a Consent Agreement between the State and the County Commission pursuant to which the Commission agreed to abide by the state open meetings statute in the future. Letter from Kansas Attorney General to Waubunsee County Attorney, 12/29/89 (Defendants' (Appellees') Appendix, 157-59); Consent Agreement, 8/28/89 (Defendants' (Appellees') Appendix, 160-62).[3]

In May 1989, the Commissioners summoned to a meeting the editor of the paper that published Mr. Umbehr's letters and columns. During that meeting, one Commissioner suggested that the paper, which received significant revenue from its designation as the official county newspaper, "take a second look at what is put in the paper, to avoid anyone getting in trouble." Another, referring to Mr. Umbehr's articles, stated that he "would like to see some of this trash eliminated."[4] Minutes of County Commission's Meeting, 5/31/89 (Plaintiff's (Appellant's) Appendix, 92-93).

On December 30, 1993, the district court granted the County Commissioners' motion for summary judgment, relying on cases holding that the government could terminate

[3] Citations to Defendants' and Plaintiff's Appendices refer to appendices filed by the parties with the court of appeals.

[4] Petitioners' Brief contains a selective recitation of the facts. It ignores the findings of the Attorney General's investigations that were adverse to the Commission and makes no mention of the Commission's meetings with the newspaper. Instead, it implies that the Commission's only confrontation with Mr. Umbehr was over landfill rates and criticisms that Mr. Umbehr made of County Commissioners during an election campaign. Petitioners' Brief at 3-4.

independent contractors on the basis of political affiliation or support.[3] It reasoned that because the First Amendment did not protect independent contractors from dismissal based on political patronage, it also did not protect them from dismissal based on their exercise of free speech on matters of public concern. *Umbehr v. McClure*, 840 F.Supp. 837, 840-41 (D.Kan. 1993).

The court nevertheless noted that, if Mr. Umbehr had been a salaried public employee, the First Amendment would have protected him from adverse action unless the government were able to show, under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that his speech on matters of public concern impermissibly interfered with the government's ability to perform its public duties efficiently. It further assumed that Mr. Umbehr's allegations were true and that the Commissioners had terminated his contract in retaliation for his comments on matters of public importance. *Umbehr v. McClure*, 840 F.Supp. at 839.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit reversed the district court's judgment, following the court of appeal's own precedent in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), and rejected as both distinguishable and unpersuasive the patronage cases upon which the district court had relied. The court noted that this was a case in which the government had terminated an independent contractor not because of his political affiliation or support, but rather because of his speech on matters of public concern. It further held that the First Amendment did protect independent contractors against retaliation based on speech and remanded the case for resolution under the *Pickering* balancing test. *Umbehr v. McClure*, 44 F.3d at 878-79, 883-84.

This Court granted *certiorari* on June 29, 1995.

[3] These cases included *Horn v. Knox*, 796 F.2d 668 (3d Cir. 1986)(*en banc*); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); and *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982).

SUMMARY OF ARGUMENT

Speech on matters of public concern occupies the "'highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices . . . will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

This Court has long held that the government may not condition the receipt or retention of government benefits on an individual's forfeiture of the right to participate in the public debate. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Under a balancing test set forth in *Pickering v. Board of Education*, however, the government may sanction a public employee for speech on matters of public concern if the employee's speech impermissibly interferes with the government's legitimate interest in maintaining harmony and discipline in the workplace. 391 U.S. at 568; *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Waters v. Churchill*, 511 U.S. __, __, 114 S.Ct. 1878, 1884 (1994).

Here, the Court is asked to determine the extent to which the First Amendment protects statements on matters of public concern made by government benefit recipients, who may, in some circumstances, resemble salaried public employees -- independent government contractors. This question is both timely and important. As more and more government functions are turned over to private firms, the

number of independent government contractors will necessarily increase.

Petitioners ask this Court to adopt the district court's holding that independent contractor speech on matters of public concern is not protected by the First Amendment. *Umbehr v. McClure*, 840 F.Supp. at 840-41; Petitioners' Brief at 17-19. The court of appeals rejected this argument, 44 F.3d at 883, and so should this Court. "Every citizen enjoys the First Amendment's protections against governmental interference with free speech," *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995), even though those protections may be slightly different in the public employment context. If the government is permitted to curb critical political speech simply by privatizing government functions, the value of the First Amendment would be placed at grave risk.

As several circuit courts have noted, the degree to which a contractor's speech on matters of public concern is protected by the First Amendment should be determined by the nature of the contractor's relationship with the government. *See id.* at 932-33; *Copsey v. Swearingen*, 36 F.3d 1336, 1344 (5th Cir. 1994); *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1381 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989). Independent contractors should be presumed to have the same First Amendment right to contribute to the public debate as members of the general public unless it can be shown that they are the functional equivalent of public employees. If there is such functional equivalency, the level of First Amendment protection for contractors' statements should be determined by the balancing test set forth in *Pickering v. Board of Education*.

This approach is necessary because, where government contractors, like trash collectors and tow truck operators, do not work in government buildings with salaried public em-

ployees under the immediate daily supervision of government administrators, the government's justification for limiting First Amendment protection is absent. The relationship between these contractors and the government is sufficiently attenuated that the contractors' speech is no more likely to disrupt the daily functioning of a government office or undermine the authority of an immediate government supervisor than the speech of a member of the general public who may engage in political debate or criticize government conduct.

Consequently, unless the government can show that its relationship with a contractor is sufficiently similar to a public employment relationship to warrant application of the *Pickering* test, the government should be forbidden from retaliating against contractors for exercising their free speech rights on matters of public concern.

ARGUMENT

INDEPENDENT CONTRACTORS DO NOT FORFEIT THEIR FIRST AMENDMENT RIGHT TO SPEAK OUT ON MATTERS OF PUBLIC CONCERN BY CONTRACTING WITH THE GOVERNMENT

A. The First Amendment Prohibits The Government From Conditioning The Receipt Of A Government Benefit On The Forfeiture Of Constitutional Rights

Under the First Amendment, every member of our society has the right to express an opinion on issues of public significance. This Court has long recognized that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by people.'" *Connick v. Myers*, 461 U.S. at

145, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Consequently, speech on matters of public concern occupies the "'highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 913, quoting *Carey v. Brown*, 447 U.S. at 467.

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Stromberg v. California, 283 U.S. 359, 369 (1931). *See also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966)("[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs"); *McIntyre v. Ohio Elections Commission*, 514 U.S. __, __, 115 S.Ct. 1511, 1518 (1995)(political speech "occupies the core of the protection afforded by the First Amendment").

Recognizing that a true democracy requires that all members of society have the opportunity to participate in the national dialogue, this Court has consistently held that the government cannot condition the receipt or retention of government benefits on an individual's forfeiture of his right to participate in public debate. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958)(government cannot deny tax exemptions on the basis of speech); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963)(government cannot deny unemployment benefits on the basis of religious free exercise); *Keyishian v.*

Board of Regents, 385 U.S. 589, 605-09 (1967)(government cannot deny public employment on the basis of association); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)(government cannot deny welfare benefits on the basis of exercise of right to travel); *Perry v. Sindermann*, 408 U.S. at 597 (government cannot deny public employment on the basis of speech); *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 283 (1977)(same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990)(government cannot deny public employment on the basis of political affiliation); *see also Lefkowitz v. Turley*, 414 U.S. 70, 83-85 (1973)(government cannot threaten independent contractors with loss of contracts to compel them to waive Fifth Amendment right against self-incrimination).

As the Court noted in *Perry v. Sindermann*,

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom on speech. For if the government could deny a benefit to a person because of his constitutionally protected speech . . . his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

408 U.S. at 597, quoting *Speiser v. Randall*, 357 U.S. at 526.

This rule is somewhat different in the public employment context. Although salaried public employees do not

lose the right to participate in the public debate by accepting a paycheck from the government, their right to speak freely on matters of public concern[6] may be affected by the government's legitimate interest in maintaining discipline and harmony in the workplace and performing its public duties with efficiency and integrity. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987), citing *Pickering v. Board of Education*, 391 U.S. at 570-73; *Smith v. Cleburne County Hospital*, 870 F.2d at 1383. Under a balancing test initially set forth in *Pickering v. Board of Education*, the government may terminate a public employee for speaking out on matters of public importance if the government's interest in promoting "the efficiency of the public services it performs through its employees" outweighs the interests of the employee, "as a citizen, in commenting upon matters of public concern." 391 U.S. at 568. *See Connick v. Myers*, 461 U.S. at 140; *Waters v. Churchill*, 114 S.Ct. at 1884; *United States v. National Treasury Employees Union*, 513 U.S. __, __, 115 S.Ct. 1003, 1012-13 (1995); *see also Brown v. Glines*,

[6] For a discussion of the contours of "public concern," *see Rankin v. McPherson*, 483 U.S. at 395 (Scalia, J., dissenting). Many courts have focused on the extent to which the employee speech was calculated to disclose wrongdoing, inefficiency or some other malfeasance on the part of government officials. *Koch v. City of Hutchinson*, 847 F.2d 1436, 1445-46 & n.17 (10th Cir.)(*en banc*), *cert. denied*, 488 U.S. 909 (1988). *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)(defining public speech as speech on "'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government"), quoting *Thornhill v. Alabama*, 310 U.S. 88, 192 (1946). *Cf. Havekost v. United States Dep't of the Navy*, 925 F.2d 316, 318 (9th Cir. 1991) (workplace grievances and individual personnel disputes that are of no relevance to the public's evaluation of the performance of governmental agencies are not protected). *See also Wulf v. City of Wichita*, 883 F.2d 842, 860 n.26 (10th Cir. 1989)(the fact that speech on a matter of public concern arose in the context of a personnel dispute does not deprive it of its First Amendment protection).

444 U.S. 348, 356 n.13 (1980)(government's ability to suppress speech is limited to that which is "reasonably necessary to promote effective government").

Petitioners ask that the rule against the imposition of unconstitutional conditions on the receipt of government benefits be further altered to create, essentially, an independent contractor exception to the First Amendment. They argue that, because local governments need broad powers to control their own operations, such governments should be permitted to terminate contractors in retaliation for speech on matters of public concern without applying the *Pickering* test. Petitioners' Brief at 17-19. Alternatively, they argue, in apparent reliance on a misreading of *Waters v. Churchill*, that the *Pickering* test should be modified to permit the government to terminate a contractor for participating in public debate as long as a reasonable public official could conclude that termination served the public interest. Petitioners' Brief at 10, 26-34.

Given our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), both arguments should be rejected for the following reasons.[7] First, there is no justification for providing independent government contractors with *less* First Amendment protection than both the general public and salaried public employees. As the Fifth Circuit noted in

[7] Because the speech for which Mr. Umbehr was punished so clearly involved matters of public concern (the use of taxpayer funds, the manner in which the County Commission held its meetings, etc.), the Court need not decide whether the First Amendment also bars the government from requiring relinquishment of other forms of constitutionally protected speech in exchange for the receipt or retention of a government benefit. But certainly, for example, the government should not be permitted to retaliate against a contractor for engaging in artistic expression on his own time, even if his art is not to the government's taste.

rejecting arguments similar to those of petitioners:

> The district court's reasoning is inverted. Every citizen enjoys the First Amendment's protections against governmental interference with free speech, but the First Amendment rights of public employees are restricted by the nature of the employer-employee relationship . . . . Outside the somewhat expanded context of public employment under *Pickering* [*v. Board of Education*] and *Connick* [*v. Myers*], a court generally examines a free speech claim under the more First Amendment friendly standard enunciated in *Perry* [*v. Sindermann*].

Blackburn v. City of Marshall, 42 F.3d at 931-32. *See also Umbehr v. McClure*, 44 F.3d at 883 ("the presumed differences between the status of independent contractors and employees . . . [does not] explain why independent contractors should be given less First Amendment protection than either ordinary citizens or government employees").

While the government, as employer, should be able to limit speech that prevents a salaried public employee from performing a job by taking him away from the office, *see Rankin v. McPherson*, 483 U.S. at 388, the same is not true of independent contractors, such as trash collectors and tow truck operators, who work on their own time and are paid only for the hours they devote to the job. How these contractors spend the rest of their time is of no concern to the government as long as the job gets done.

While the government, as employer, may be able to restrain employee speech that may result in "immediate workplace disruption," by destroying close working relationships with other government employees or undermining supervisory authority, *see Connick v. Myers*, 461 U.S. at 154; *United States v. National Treasury Employees Union*, 115 S.Ct. at

1012-14, this restraint is not justified when applied to independent contractors who are infrequently at the government workplace or office, and do not have close working relationships with salaried public employees. Such contractors are seldom, if ever, likely to create "immediate workplace disruption."

And, while the speech of high-level, policymaking government employees may be curbed if it impermissibly undermines citizen trust and confidence in the government, *see Waters v. Churchill*, 114 S.Ct. at 1186, that rationale does not extend to contractors whose relationship with the government is sufficiently attenuated that they are not viewed as government representatives. Such contractors, by definition, speak for themselves.

Second, *Waters* supports neither abandonment of the *Pickering* balancing test nor modification of that test to a mere "reasonable" or "rational basis" test. Instead, it reaffirms the *Pickering* rule that the government may force an employee to relinquish free speech rights only if the employee's speech materially interferes with the efficiency of the public service, and clarifies that material interference must be judged by the standard of a reasonable supervisor. 114 S.Ct. at 1889. *See United States v. National Treasury Employees Union*, 115 S.Ct. at 1020-21 (O'Connor, J., concurring and dissenting in part).

Given the breadth and volume of benefits distributed by federal, state and local governments, including not only employment contracts, but also grants, licenses, jobs, tax exemptions, social security, welfare benefits, medical services, advertising and access to public property, among others, any weakening of this Court's longstanding rule against the imposition of conditions on the receipt of benefits would have a devastating impact on free speech and the functioning of the democratic process. Indeed, it would permit the govern-

ment to subdue the willingness of citizens to speak out on matters of political concern, thereby "produc[ing] a result" -- the suppression of political information and ideas -- that it "could not command directly." *Id.* *See also Blackburn v. City of Marshall*, 42 F.3d at 931-33; *Northern Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).

B. The Degree To Which A Contractor's Speech On Matters Of Public Concern Is Protected By The First Amendment Depends Upon Whether He May Be Considered The Equivalent Of A Salaried Public Employee

Because independent contractors are like other recipients of government benefits, they should not be forced to relinquish their First Amendment right to contribute to the public debate as a condition of retaining their contracts unless it can be shown that they are the functional equivalent of public employees. Even if a contractor's relationship with the government is such that he constitutes a "quasi-public employee," he should be afforded the same First Amendment protection as a public employee, and the degree to which his statements on matters of public concern are constitutionally protected should be determined by the *Pickering* test.[8]

A number of circuit courts have adopted the standard proposed herein, holding that the nature of the contractor's relationship with the government determines the degree to

[8] Courts are frequently asked to decide whether an individual constitutes an employee or an independent contractor in a variety of different contexts. *See, e.g., Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992)(taxation); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(copyright).

which the contractor's statements are constitutionally protected. *See Blackburn v. City of Marshall*, 42 F.3d at 932-33; *Copsey v. Swearingen*, 36 F.3d at 1343-44; *Smith v. Cleburne County Hospital*, 870 F.2d at 1381. In *Blackburn*, for example, the Fifth Circuit held that the owner of a towing and wrecking service used by the city to remove cars from accident sites was entitled to the same First Amendment protection as that of any other recipient of a government benefit. He did not constitute a "quasi-public employee." 42 F.3d at 929, 934. *See also Abercrombie v. City of Catoosa*, 896 F.2d at 1233 (same).

Where a contractor does not work in a government office building with salaried public employees under the daily supervision of a government administrator, the justification for the *Pickering* balancing test is absent, and the contractor should be treated no differently than a member of the general public. On the other hand, in *Smith*, 870 F.2d at 1381, the Eighth Circuit applied the *Pickering* test to statements made by a doctor working at a county hospital after finding that the doctor's relationship to the hospital was similar to a public employment relationship. The doctor was required to perform regular duties at the hospital, reported to hospital administrators and worked closely with salaried hospital employees. *See also Copsey v. Swearingen*, 36 F.3d at 1344 (applying the *Pickering* test to statements made by a vendor who operated a concession stand in Louisiana's state capitol building pursuant to a licensing program for the blind because he was trained by the state, his vending space was owned by the state, and the state furnished him with substantial equipment and inventory).

To accord independent contractors any less First Amendment protection would be injurious to the democratic process. Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-

government. As this Court has noted, those who work for or with the government "are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 114 S.Ct. at 1887, citing *Pickering v. Board of Education*, 391 U.S. at 572.

C. Respondent's Speech On Matters Of Public Concern Is Protected By The First Amendment Under Any Applicable Standard

Although the court of appeals correctly reversed the district court's holding that Mr. Umbehr forfeited all his First Amendment rights when he contracted to haul trash for the local government, it incorrectly evaluated Mr. Umbehr's First Amendment rights under the *Pickering* test. Like the tow truck operators in *Blackburn* and *Abercrombie*, Mr. Umbehr operated without government supervision, did not work in a government building, had no daily contact with salaried government employees, and did not hold himself out as a government spokesperson or representative. As petitioners note, he "was free to decide how many trucks to operate, how many employees to hire, what wages to pay, the schedules to be followed in collecting trash from residential customers, and the means of disposing of the accumulated refuse." Petitioners' Brief at 19. The communities for which he collected trash were at liberty to reject his services.

Accordingly, Mr. Umbehr had no greater opportunity to disrupt the functioning of a government office or influence its morale than a member of the general public. His speech should have been afforded the same First Amendment protection as that of any other citizen, and petitioners should be prohibited from terminating his contract in retaliation for his speech on matters of public concern, regardless of their interest in avoiding annoyance, embarrassment or "disruption."

Should the Court decide, however, that Mr. Umbehr was sufficiently like a public employee that the *Pickering* balancing test should apply, the balance should tip in Mr. Umbehr's favor. In cases applying *Pickering*, the government's interest in efficiency has been found to outweigh the employer's free speech interest only if the speech disrupts or threatens to disrupt the employee's ability to perform his work, his relationships with his co-workers or immediate superiors, or the daily efficiency of the workplace.[9] *See, e.g.*, *Pickering v. Board of Education*, 391 U.S. at 569-70 (statements by public school teacher were protected because they were "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher"); *Connick v. Myers*, 461 U.S. at 154 (statements by assistant district attorney that disrupted office, undermined district attorney's authority and destroyed close working relationships were not protected); *Rankin v. McPherson*, 483 U.S. at 389-91 (statement by secretary in county constable's office concerning assassination of president was protected because it did not interfere with efficiency of office or employee's ability to do her job); *Waters v. Churchill*, 114 S.Ct. at 1890-91 (statements by nurse at a public hospital that undermined authority of her immediate supervisor were not protected); *Copsey v. Swearingen*, 36 F.3d at 1346 (statements by government vendor were protected because they did not relate to ongoing operation of the vendor's stand, or to his day-to-day interaction with government); *Smith v. Cleburne County Hospital*, 870

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[9] While the Court has given substantial weight to a government employer's predictions of disruption, it has also found that those predictions must be based upon an assessment of the facts that a neutral fact finder would consider reasonable, *Waters v. Churchill*, 114 S.Ct. at 1889, and may not be conjectural. *United States v. National Treasury Employees Union*, 115 S.Ct. at 1017.

F.2d at 1383 (statements by doctor in a public hospital were not protected because they went beyond matters of public concern and constituted personal attacks against administrators, nursing staff and other personnel that were disruptive to hospital's day-to-day management).

Mr. Umbehr's statements did not affect his ability to collect trash and, because he had no public employee coworkers or supervisors, did not disrupt office dynamics or workplace harmony. Instead, they took issue with administrative decisions made by the County Commission and, in certain instances, exposed government wrongdoings. Courts have refused to tip the *Pickering* balance in the government's favor if its only interest is "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969), or to avoid the disruption necessarily caused by an employee exposing government fraud or corruption. *See Pickering v. Board of Education*, 391 U.S. at 572; *Waters v. Churchill*, 114 S.Ct. at 1887; *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir. 1994); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1404-08 (9th Cir. 1988); *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983).

D. The Government's Need To Control Its Own Operation Does Not Justify The Deprivation Of First Amendment Protection

Petitioners' asserted fears that protecting an independent contractor against retaliation for speech will permit contractors to control government decisions or run government agencies for their own economic gain are unfounded. Regardless of the degree of First Amendment protection afforded to independent contractors, the government is still entitled to exercise the same rights and remedies that it has

in any contractual situation, as long as it does not do so for unconstitutional reasons. It still may dictate which government functions should be performed by contractors as opposed to salaried employees, establish the contract terms, and modify and/or terminate the contracts for any reason that does not infringe upon a contractor's constitutional rights and is consistent with the contract, including nonperformance, frustration of purpose, or a change in policy. *See* Restatement (Second) of Contracts, §§231-272 (1981).

In addition, under *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. at 286-87, once a contractor establishes that his speech was a substantial factor in the adverse action taken against him, the government may still avoid liability by showing that it would have taken the same action even in the absence of the protected speech.[10] Thus, protecting contractors against retaliation for their speech on public issues hardly inhibits government's ability to function efficiently and terminate contracts for legitimate reasons.

E. Cases Holding That Independent Contractors May Be Dismissed Because Of Their Political Affiliations, As Opposed To Their Speech, Are Distinguishable And Inapplicable

The district court adopted petitioners' arguments and held that the government may terminate an independent contractor for speaking out on matters of public concern, rely-

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[10] These other reasons must have played a part in the government's decision at the time that it was made. Evidence acquired or rationales developed after termination will not suffice. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. __, __, 115 S.Ct. 879, 883-85 (1995). Although petitioners rely on *McKennon* to assert that later-acquired evidence should relieve government of liability, Petitioners' Brief at 33, *McKennon* rejected precisely this argument. 115 S.Ct. at 883-85.

ing on cases from various circuit courts holding that the government may terminate a contractor because of political affiliation. *Umbehr v. McClure*, 840 F.Supp. at 839-40, citing *Downtown Auto Parks v. City of Milwaukee*, 938 F.2d 705, 709 n.5 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986)(*en banc*); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982). As the court of appeals found, these patronage cases are both distinguishable from and inapplicable to the case at hand. *Umbehr v. McClure*, 44 F.3d at 883.

First, as petitioners acknowledge and the court of appeals found, Mr. Umbehr was never threatened with dismissal because of his political associations. Petitioners' Brief at 15. Thus, the government's interest in the maintenance of the patronage system -- the stability of the two-party system, or the ability to bestow policymaking jobs on party supporters -- is not implicated. *See Elrod v. Burns*, 427 U.S. 347, 368 (1976); *Rutan v. Republic Party*, 497 U.S. at 104-07 (Scalia, J., dissenting).

Second, these cases underestimate the interest of contractors such as Mr. Umbehr in retaining their relationship with the government. Although this Court has never ruled on whether the First Amendment protects independent contractors from termination based on political affiliation, it has repeatedly found that the First Amendment protects non-policymaking public employees from such retaliation. *See Elrod v. Burns*, 427 U.S. at 362-63 (plurality opinion) and 375 (Stewart, J., concurring); *Branti v. Finkel*, 445 U.S. 507, 515-17 (1980); *Rutan v. Republican Party*, 497 U.S. at 78-79. Some circuit courts have refused to extend these rulings to independent contractors, finding that an independent contractor's First Amendment interests are not as strong as those of a public employee because the loss of a contract

is less devastating to a contractor than the loss of a job is to a public employee. *Horn v. Kean*, 796 F.2d at 675 n.9; *LaFalce v. Houston*, 712 F.2d at 294. *See also Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583, 587-88 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990).

While this may be true for some contractors, many contractors, such as Mr. Umbehr, only contract with the government. Consequently, the loss of a government contract can mean the loss of the contractor's livelihood. *See Rutan v. Republican Party*, 497 U.S. at 77 ("denial of a state job is a serious deprivation"). Moreover, to use an individual's economic status to determine whether his First Amendment rights were violated undermines the principles behind the freedoms of speech, belief and association:

> The constitutional wrong condemned in *Elrod* and *Branti* was the state's attempt to control the beliefs and associations of its citizens. That control can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent . . . . While independent contractors may not lose all their income if a state contract is withdrawn, the knowledge that their income would drop by ten percent may be sufficient to induce the contractors to conform their political views to those of the reigning power.

Horn v. Kean, 796 F.2d at 683 (Gibbons, C.J., dissenting)(citations omitted). *See Umbehr v. McClure*, 44 F.3d at 883 ("[i]n this First Amendment context, we reject any categorical distinctions based on whether independent contractors have more or less of an economic interest in their governmental contracts").

Thus, the patronage cases cannot be used to justify gov-

ernment retaliation against independent contractors for exercising their First Amendment right to speak freely on issues of public concern.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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